MISSISSIPPI LAW JOURNAL

SYMPOSIUM ON MISSISSIPPI EVIDENCE—PART I

FOREWORD

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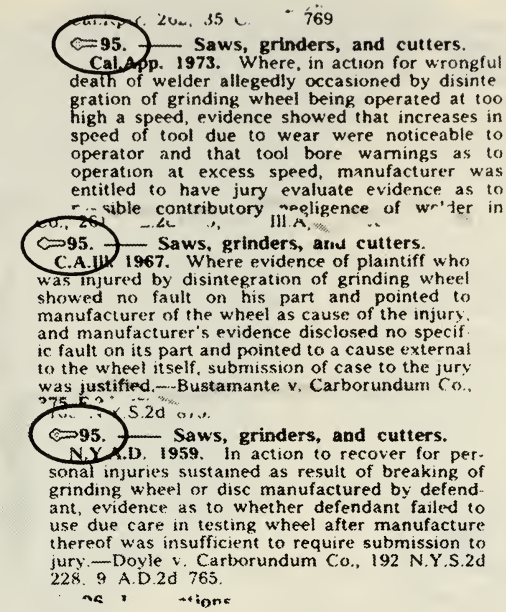

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95. —— Saws, grinders, and cutters.

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N.Y.A.D. 1959. In action to recover for personal injuries sustained as result of breaking of grinding wheel or disc manufactured by defendant, evidence as to whether defendant failed to use due care in testing wheel after manufacture thereof was insufficient to require submission to jury.—Doyle v. Carborundum Co., 192 N.Y.S.2d 228, 9 A.D.2d 765.

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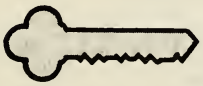

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FOREWORD

*The Honorable James P. Coleman**

After forty years at the Bar, including four years as a state trial judge and twelve years on the federal appellate bench, I find it quite impossible to overstate the importance of a comprehensive knowledge of the law of evidence. Without it the trial practitioner cannot operate with maximum effectiveness to himself, or to his client, or to the court. The possession of useful facts is unavailing if counsel is unacquainted with the method by which those facts may be presented in admissible form.

But that is not the end of it. Even if the lawyer does not engage in trial practice he is in no position fully to advise the client about disputed matters if he does not know what that client might use or what the adversary may not use.

For many years I have been convinced, and I have often said, that it matters not how much law a lawyer may know if he does not know the rules of evidence by which legal principles are to be made operative. It is something like owning an automobile without the ability to drive it.

With this evaluation I am more than pleased to see the *Mississippi Law Journal* prepare and present this symposium. I do hope that the Bar will make the most of it.

Finally, I must remind the Bar that the rules of evidence in the state and federal courts often differ in critical particulars. It pains me to see lawyers come into the Court of Appeals relying on state rules of evidence, only to find that they have lost an otherwise meritorious case for lack of familiarity with the federal rules. I think we have lived long past the time when lawyers should have to be familiar with *two* road maps for travel in our system of justice. The mastery of one should be enough. Unless necessary for the protection of some vital state interest in the welfare of its own citizens on some specific subject, state rules should be conformed to the federal, eliminating the hazards of confusion and possible injustice. Changes do not come easily, even when they are meritorious, but that powerful negative force, inertia, should not be allowed to prevail on this extremely vital subject.

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* Circuit Judge, United States Court of Appeals for the Fifth Circuit.

GENERAL PROVISIONS

*Robert C. Galloway**

Article I of the Federal Rules of Evidence, General Provisions,[1] consists of six rules which are more procedural than substantive. These six rules provide instructions for the application of the other rules, as well as limitations on the methods of determining admissibility. Rule 101 indicates the proceedings to which the rules are applicable. The purpose of the rules of evidence and canons of construction are set out in rule 102. Rule 103 outlines the steps that must be followed at the trial level in order to preserve an error for appeal, while the procedure to be used in determining preliminary questions is explained in rule 104. Finally, rules 105 and 106 deal respectively with limitations on the scope of admitted evidence and the doctrine of completeness of offered evidence.

Rule 101. Scope

Rule 101 provides that the Federal Rules of Evidence will apply in proceedings in the courts of the United States and before United States magistrates, subject to the limitations of rule 1101.[2] This brief statement of scope serves a dual function. Rule 101 first symbolizes the unification of the law of evidence under the Federal Rules of Evidence.[3] Additionally, the rule provides a cross-reference to rule 1101,[4] which sets out in detail the circumstances in which the rules will apply.[5]

Rule 1101 enumerates the different courts in which the rules are

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[1] For detailed discussions of the general provisions, see 21 C. Wright & K. Graham, Federal Practice & Procedure: Evidence §§ 5011-5087 (1977); 10 Moore's Federal Practice §§ 100.01-106.01. (2d ed. 1976); 1 Weinstein's Evidence ¶¶ 101[01] to 107[07] (1976).

[2] Fed. R. Evid. 101.

[3] The goal of replacing "conformity to state procedure with uniformity throughout the nation" was a major motivation for enacting the Federal Rules of Evidence. Pelt, *Introduction, The Federal Rules of Evidence Symposium,* 36 La. L. Rev. 59, 67 (1975). For a discussion of the development of the law of evidence and the need for uniformity, see Tone, *The Federal Rules of Evidence,* 54 Chi. B. Rec. 307 (1973). The advantages and disadvantages of uniform rules of evidence are compared in Weinberg, *Choice of Law and the Proposed Federal Rules of Evidence: New Perspectives,* 122 Pa. L. Rev. 594 (1974).

[4] Fed. R. Evid. 1101.

[5] Details of scope were placed in a later rule to avoid overwhelming the reader with complex limitations at the outset. 10 Moore's Federal Practice § 101.02, at I-4 (2d ed. 1976).

applicable[6] and provides that the rules govern criminal cases, civil cases, and proceedings under the Bankruptcy Act.[7] Rule 1101 precludes applicability of the rules when proceedings are before a grand jury or when a judge is authorized under rule 104[8] to determine preliminary factual questions.[9] Rule 1101 also places limitations on applicability of the rules in certain enumerated proceedings.[10]

Despite its apparent simplicity, rule 101 involves underlying questions of considerable importance. Since the rule represents the unification of the law of evidence, it necessarily symbolizes the displacement of state law in the federal court system.[11] This displacement signals the continuing decline of the *Erie*[12] doctrine of federal court application of state law.[13] Another result, not apparent on the face of rule 101, stems from constitutional limitations on the rulemaking power of Congress, which may prevent application of the rules in some circumstances.[14]

Section 13-1-1 of the Mississippi Code,[15] the introductory provision to the statutory chapter on evidence, equates to rule 101 and specifies general application except where otherwise provided. There is, however, no comprehensive listing elsewhere of the exceptions comparable to the list provided in rule 1101. As a result, one must often rely on implication to determine whether the rules of evidence are applicable in a particular

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[6] FED. R. EVID. 1101(a) provides that the "rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the District of the Canal Zone, the United States courts of appeals, the Court of Claims, and to United States magistrates . . . ."

[7] *Id.* 1101(b).

[8] *Id.* 104. See note 86 *infra*.

[9] FED. R. EVID. 1101(d). This provision does not apply to the rule with respect to privileges, *id.* 501, which applies at all stages of all actions, cases, and proceedings. *Id.* 1101(c).

[10] *Id.* 1101(e) provides that in various proceedings, primarily those involving review of agency action, the rules apply only to the extent that governing statutes do not provide for matters of evidence.

[11] The rules specifically provide for application of state law only in the areas of presumption, privilege, and authentication. *Id.* 302, 501 & 903.

[12] Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938) (federal courts must observe the substantive laws of a state in diversity cases).

[13] *See generally* Blackmar, *The Proposed Federal Rules of Evidence—How Will They Affect the Trial of Cases?*, 27 WASH. & LEE L. REV. 17 (1970); Ward, Erie, *Privileges, and the Proposed Federal Rules of Evidence: Confusion,* 10 NEW ENG. L. REV. 399 (1974); Weinberg, *supra* note 3; Comment, *Major Changes under the Proposed Federal Rules of Evidence,* 37 TENN. L. REV. 556 (1970); Note, *Federal Rules of Privilege in Diversity Cases: A Time for Congressional Action,* 8 SUFFOLK U.L. REV. 1217 (1974).

[14] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5013, at 119. *See generally* Slovenko, *Constitutional Limitations on the Rules of Evidence,* 26 U. CIN. L. REV. 493 (1957).

[15] MISS. CODE ANN. § 13-1-1 (1972) states, "All provisions contained in this chapter, unless restricted by their nature or by express provision to particular courts, shall apply to and govern all courts."

case.[16] An official rule setting out the instances in which the rules of evidence do not apply would be helpful to every trial lawyer.

Rule 102. Purpose and Construction

Rule 102 provides that ascertainment of truth and just determination of proceedings are the ends to which the Federal Rules of Evidence are to be the means. The rule also sets out three canons of construction, requiring that the rules be applied to achieve fairness in administration, eliminate unjustifiable expense and delay, and promote growth and development of the law of evidence.[17]

The importance of rule 102 to the Federal Rules of Evidence lies in its inherent flexibility. By phrasing the purposes of the rules in the abstract terms of truth[18] and justice,[19] rule 102 implies that accomplishment of these goals takes precedence over unnecessarily technical construction.[20] Similarly, the enumeration of three canons of construction necessitates flexibility, since fairness, elimination of expense, and promotion of growth may conflict in a particular case.[21] Because the Federal Rules of Evidence are considered to have replaced, rather than codified, existing precedents, drafters of the rules had to either provide for flexibility or foresee every factual situation which might arise. Rule 102 is an expression of the drafters' choice of flexibility, as well as a recognition of the traditional discretion vested in district judges.[22]

The first two grounds of construction, fairness in administration[23]

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[16] An analagous problem is created by Miss. Code Ann. § 13-1-201 (Supp. 1977), which implies that the new state discovery rules do not apply to criminal cases or to justice courts. The statute does not specifically mention the court of eminent domain. There seems to be no logical reason for excluding eminent domain proceedings from the discovery statutes. Nevertheless, cases such as Mississippi State Highway Comm'n v. Prescott, 346 So. 2d 924, 925 (Miss. 1977), emphasizing the special nature of the court of eminent domain, could be interpreted to mean that courts of eminent domain are excluded unless named.

[17] Fed. R. Evid. 102.

[18] For a discussion of the role played by rules of evidence in the ascertainment of truth, see Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials,* 66 Colum. L. Rev. 223 (1966).

[19] An interesting new perspective on legal rules as a means to the ends of justice is developed in J. Rawls, A Theory of Justice (1971), *discussed in* Merritt, *Justice as Fairness: A Commentary on Rawls' New Theory of Justice,* 26 Vand. L. Rev. 665 (1973), and *reviewed in* Neumaier, Book Review, 47 Miss. L.J. 827 (1976).

[20] 1 Weinstein's Evidence ¶ 102[01], at 102-7 (1976).

[21] In each case, the court must balance these values. For example, it may be necessary to "forego a 'just' decision in an individual case to preserve and enforce a rule designed to provide 'speed' in other cases." Weinstein, *supra* note 18, at 241-42.

[22] 1 Weinstein's Evidence ¶ 102[01], at 102-5 to -7 (1976).

[23] One writer has stated that an inherent danger inures from the use of a general term such as "fairness," since the concept of fairness will "vary from judge to judge, and

and elimination of expense and delay,[24] are based on previous federal rules.[25] The third canon, promotion of growth and development of the law of evidence, is new, and consequently, it has provoked the most discussion and criticism. The Advisory Committee stated that the "growth and development" phrase was to be used to cover new or unanticipated situations and that the rules should apply by analogy.[26] Thus, the phrase is not to be used to overrule precedent in familiar situations, but to allow response to societal changes. A method of construction such as this is essential if courts are to adjust to circumstances as they alter.[27] On the other hand, some commentators view the objective of growth as a judicial license to override substantive provisions of the rules. These writers suggest that the phrase could be construed to extend a judge's discretion, allowing a ruling which, without rule 102, would have been made the opposite way.[28] Other writers have expressed concern that encouragement of evidentiary growth will result in such unregulated development as to make diverse that which the draftsmen sought to make uniform.[29] Although a conclusion that these concerns are unfounded would be premature, judicial application of rule 102 thus far in no way justifies either of the theories.[30]

Rule 102 unquestionably allows a considerable amount of judicial

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from year to year with the same judge." Bucklin, *A North Dakota Commentary on the Federal Rules of Evidence*, 52 N.D. L. REV. 13, 15 (1975).

[24] Rule 102 does not indicate whose expenses are to be considered or what items should be counted as an expense. 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5024, at 140-41.

[25] FED. R. CIV. P. 1 provides, "[These rules] shall be construed to secure the just, speedy and inexpensive determination of every action." Similarly, FED. R. CRIM. P. 2 provides, "[These rules] shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."

[26] *Hearings on Proposed Rules of Evidence before the Special Subcomm. on the Reform of the Federal Criminal Laws of the House Comm. on the Judiciary,* Serial No. 2, 93d Cong., 1st Sess. (1973)(statement of Professor Cleary), *cited in* 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5025, at 145.

[27] *See* Goodhart, *A Changing Approach to the Law of Evidence,* 51 VA. L. REV. 759, 782-84 (1965) (conclusion speaks of the necessity of replacing outmoded rules of evidence). For further background information on the meaning of "growth and development," see S. REP. No. 1277, 93d Cong., 2d Sess. 18-19, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7065-66.

[28] *See* 10 MOORE'S FEDERAL PRACTICE § 102.02, at I-8, -9 (2d ed. 1976); 1 WEINSTEIN'S EVIDENCE ¶ 102[01], at 102-6 n.4 (1976).

[29] 10 MOORE'S FEDERAL PRACTICE § 102.02, at I-8, -9 (2d ed. 1976).

[30] *See* United States v. Thorne, 547 F.2d 56, 59 (8th Cir. 1976) (court did not rely upon the "growth and development" method of construction); United States v. King, 73 F.R.D. 103 (E.D.N.Y. 1976)(no emphasis placed on the phrase "growth and development" contained in rule 102); United States v. Jackson, 405 F. Supp. 938, 945 (E.D.N.Y. 1975) (rule 102 used to construe rule 403 as giving trial courts discretionary judgment in order to "minimize the evidentiary costs of protecting parties from unfair prejudice").

discretion, through the abstract goals of truth and justice as well as through the subjective canons of construction.[31] Nevertheless, this does not imply that a judge may disregard the rules entirely. Rule 102 is not an independent grant of discretion, but a guide to be used in the exercise of judicial discretion,[32] and an allowance for flexibility in applying the other rules.[33]

Although Mississippi has no statute comparable to rule 102, the supreme court has indicated that its attitude is similar to that expressed in the rule. In *Newell v. State*,[34] the court noted that all courts "share a common purpose—the fair and efficient administration of justice."[35] Likewise, growth and development of the law has frequently been used as a canon of construction by the Mississippi Supreme Court. Examples in the field of evidence include extensions of old rules to allow the admission of properly qualified motion pictures[36] and computer printouts of electronically maintained business records.[37] In authorizing the admission of computerized business records, the court stated, "The law always seeks the best evidence and adjusts its rules to accommodate itself to the advancements of the age it serves."[38]

The Mississippi legislature has enacted a statute prescribing new rules for discovery in state courts and granting the supreme court certain rulemaking powers.[39] Among the powers granted is the power to promulgate rules of evidence,[40] subject to the limitation that the rules "not alter any statutory provision respecting privileged communications or competency of witnesses."[41] In considering rules of evidence for state court practice, careful thought should be given to a general rule of purpose and construction such as rule 102. Furthermore, a general rule stating final objectives and guidelines for construction of other rules should be

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[31] See notes 21 through 25, 29 and accompanying text *supra*. The factors which may affect judicial discretion are discussed in Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975).

[32] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5023, at 128-29.

[33] 1 WEINSTEIN'S EVIDENCE ¶ 102[01], at 102-10 (1976).

[34] 308 So. 2d 71 (Miss. 1975).

[35] *Id.* at 74.

[36] *See* Metropolitan Life Ins. Co. v. Wright, 190 Miss. 53, 63-64, 199 So. 289, 291 (1940) (motion picture admissible when its accuracy is proved).

[37] *See* King v. State *ex rel.* Murdock Acceptance Corp., 222 So. 2d 393, 398 (Miss. 1969) (computer printout of business records admissible if relevant and material), *noted in* 41 MISS. L.J. 604 (1970).

[38] *Id.* at 397.

[39] MISS. CODE ANN. §§ 9-3-61 to -73 (Supp. 1977). For an exhaustive treatment of state discovery procedures, see Pyle, Ott, & Rumfelt, *Mississippi Rules of Discovery*, 46 MISS. L.J. 681 (1975).

[40] MISS. CODE ANN. § 9-3-61 (Supp. 1977).

[41] *Id.* § 9-3-63.

supplemented with official notes to illustrate the manner in which its drafters intend the rule to be applied.

RULE 103. RULINGS ON EVIDENCE[42]

Rule 103 basically provides that a ruling on evidence may be assigned as error only if a substantial right is affected and the nature of the error is made known to the judge.[43] The rule, taken from the Federal Rules of Criminal and Civil Procedure, United States Supreme Court precedent, and generally accepted principles of law,[44] operates as a codification of existing law rather than a creation of new rules.[45]

The initial phrase of rule 103(a) embodies the concept of harmless error. Under this common law concept, an error which does not affect substantial rights is a mere technicality and, therefore, will not be the basis for a reversal.[46] Decisions rendered after implementation of the rules indicate that rule 103 is merely a restatement of this concept. Indeed, these decisions both acknowledge the existing "harmless error" rule and cite rule 103(a) without distinguishing the two.[47]

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[42] FED. R. EVID. 103 provides:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

See Appeal & Error ⚖ 169, 181, 204, 205; Criminal Law ⚖ 1043-45, 1120-24; Trial ⚖ 82-84.

[43] FED. R. EVID. 103(a), Advisory Comm. Note.

[44] *Id.*

[45] *Rules of Evidence: Hearings before the Comm. on the Judiciary*, 93d Cong., 2d Sess. 20 (1974) (statement of Rep. William L. Hungate).

[46] 1 WEINSTEIN'S EVIDENCE ¶ 103[06], at 103-43 (1976). For a discussion of the history of the concept, see 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5035, at 169-74.

[47] *E.g.*, United States v. Melvin, 544 F.2d 767, 778 (5th Cir. 1977) (harmless error

Rule 103(a)(1) emphasizes the necessity of timeliness and specificity in objecting to the admission of evidence. The purpose of such a requirement is to permit the trial judge to make a ruling which will prevent error and to allow the opposing party to correct the deficiency if possible.[48] In order for an objection to be timely, it must be made as soon as the ground becomes apparent to counsel.[49] This is usually when the witness is asked a question. In some instances, however, a permissible question may evoke an objectionable reply. Counsel should then respond with a motion to strike, which would be timely if made immediately following the response.[50]

The requirement of specificity calls for a statement of the grounds on which the objection is based.[51] Rule 103(a)(1) qualifies this requirement by providing that a general objection will suffice where the specific ground was apparent. Cases decided after the Federal Rules of Evidence were enacted contain numerous citations to preexisting authority on timeliness and specificity, indicating that rule 103(a)(1) is merely a restatement of these requirements.[52]

Rule 103(a)(2) restates the well-established rule that "a party cannot raise as error the exclusion of evidence unless its substance was made known to the judge by offer or was apparent from the context."[53] The rule does not include a requirement that the offeror state the specific grounds supporting admissibility or that the offer be timely. This omission contravenes the traditional view that the offer must be specific, not general.[54] Although it can be argued that rule 103(a)(2) abolishes this requirement, Professors Wright and Graham contend that the prior common law rules regulating offer of proof will continue to be viable. As they point out, circuit courts of appeals are unlikely to reverse

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found where list compiled by State Department of Beverages was admitted as evidence and no specific objections uttered); International Merger & Acquisition Consultants, Inc. v. Armac Enterprises, Inc., 531 F.2d 821, 823 (7th Cir. 1976) (trial court must disregard any error or defect not affecting the litigants' substantial rights); Arcement v. Southern Pac. Transp. Co., 517 F.2d 729, 732, 734 (5th Cir. 1975) (error by trial judge in refusing to admit certain testimony held to be harmless error).

[48] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5036, at 177.

[49] 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §18, at 330 (3d ed. 1940).

[50] 1 WEINSTEIN'S EVIDENCE ¶ 103[02], at 103-18, -19 (1976).

[51] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5036, at 177-78.

[52] *See, e.g.,* United States v. Jamerson, 549 F.2d 1263, 1266-67 (9th Cir. 1977) (failure to make timely objection); United States v. Latimer, 548 F.2d 311, 314-15 (10th Cir. 1977) (failure to object at all); Morrow v. Greyhound Lines, Inc., 541 F.2d 713, 723-24 (8th Cir. 1976) (failure to make specific objection).

[53] Nanda v. Ford Motor Co., 509 F.2d 213, 223 (7th Cir. 1974).

[54] *See* Armour & Co. v. Nard, 463 F.2d 8, 12 (8th Cir. 1972)(offeror must demonstrate the significance of excluded testimony).

a case for a trial judge's exclusion of evidence unless that judge was given the opportunity to rule on the offer and objection on specific principles of admissibility.[55] Decisions applying rule 103(a)(2) have upheld on review the exclusion of evidence where no offer of proof was made at the trial.[56] Rule 103(a)(2) also allows an exception from the offer requirement when the substance of the evidence attempted to be introduced was apparent from the context within which questions were asked. The Eighth Circuit recently held this exception applicable, stating that "it is clear from the transcript . . . that the [trial] court was aware of the general nature of the evidence to be offered."[57]

Subdivision (b) of rule 103 provides that a judge may add statements to the record indicating the nature and form of the evidence and any objections that were made. He may also direct that an offer be made in question and answer form. This subdivision is derived from former rule 43(c)[58] of the Federal Rules of Civil Procedure even though the second sentence of rule 103(b) deviates somewhat. Under rule 43(c), the question-and-answer form was mandatory on the request of a party.[59] The omission of this requirement from rule 103(b) grants the court discretion to determine the form of offer.[60]

Subdivision (b) of rule 103 also ensures that objections will be preserved in such a manner that the reviewing court will have an adequate record of the proceedings in the trial court.[61] Although the subdivision implies that the trial judge is to assume this responsibility, counsel should not hesitate to request the judge to act if it appears he otherwise might not.[62] Although no case was found citing rule 103(b), its language is sufficiently straightforward as to require little judicial definition. When this rule is involved on appeal, the issue is whether the trial court abused its discretion.[63]

Rule 103(c), concerning proceedings outside the presence of the jury, was not borrowed from existing rules as were the other provisions of rule 103.[64] The emphasis of 103(c) is clearly on keeping information

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[55] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5040, at 212.

[56] *See, e.g.*, Mills v. Levy, 537 F.2d 1331, 1333 (5th Cir. 1976) (since no offer of proof was made as to the excluded evidence at the trial, there was no error in excluding the testimony); United States v. Muncy, 526 F.2d 1261, 1263 (5th Cir. 1976) (no error where there was no offer of proof).

[57] Charter v. Chleborad, 551 F.2d 246, 249 (8th Cir. 1977).

[58] *See* Order, 56 F.R.D. 183, 195 (1972) (promulgated by the Supreme Court of the United States).

[59] *Id.*

[60] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5041, at 223-24.

[61] 1 WEINSTEIN'S EVIDENCE ¶ 103[04], at 103-36 (1976).

[62] *Id.*

[63] *See* 10 MOORE'S FEDERAL PRACTICE § 103.23, at I-34 n.7 (2d ed. 1976).

[64] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5042, at 230.

which may not be admissible away from the jury until the question of admissibility has been resolved. The provision states that the offers and discussions are to be conducted outside the presence of the jury whenever practicable. Furthermore, this conditional command applies to all phases of the issue before the court—the question, the objection, statements of reason for objection and grounds for admissibility, and extraneous comments.[65] This provision could be applied to reverse a trial court only if the evidence offered in the presence of the jury were held by the trial court to be inadmissible and, in addition, if the offer affected a "substantial right" of a party within the meaning of rule 103(a).[66]

Rule 103(d), adopted from the Federal Rules of Criminal Procedure,[67] is a restatement of the "plain error" concept. A party who does not meet the requirements of rule 103(a) on objection and offer of proof may be allowed reversal on appeal if the error caused a substantial injustice to the party.[68] The concept may be of little use in regard to evidentiary issues, however, since errors involving evidence will seldom have the necessary impact on the fairness of the trial.[69]

Mississippi law generally follows the pronouncements of rule 103. The harmless error concept of rule 103(a) is expressly set out in the state supreme court's rules.[70] Furthermore, the Mississippi Supreme Court recently applied the concept to an evidentiary ruling, stating that "unless the trial court has violated a rule of evidence to the hurt and prejudice of one of the litigants, this Court will not reverse . . . ."[71]

The federal rule provides that failure to object to evidence prevents a party from raising the issue of improper admission on appeal. The Mississippi court applies this same rule to documents[72] and testimony,[73] and in criminal[74] as well as civil cases. Continuing the parallel,

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[65] *Id.*

[66] International Merger & Acquisition Consultants, Inc. v. Armac Enterprises, Inc., 531 F.2d 821, 824 (7th Cir. 1976).

[67] FED. R. CRIM. P. 52(b).

[68] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5043, at 236.

[69] *Id.*; Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975), is a case illustrative of the showing necessary to invoke the plain error rule. In *Edwards*, the court stated that "the error in final argument was of such magnitude . . . as to have seriously prejudiced defendant's right to a fair trial . . . ." *Id.* at 286.

[70] MISS. SUP. CT. R. 11 provides:

> No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

[71] Mississippi State Highway Comm'n v. Frierson, 240 So. 2d 457, 459 (Miss. 1970).

[72] *See* Mabry v. Winding, 229 Miss. 88, 96, 90 So. 2d 175, 178 (1956) (failure to object to introduction of land survey).

[73] *See* Hazel Mach. Co. v. Shahan, 249 Miss. 301, 320, 161 So. 2d 618, 625 (1964) (failure to object on grounds that the best evidence rule was violated).

[74] *See* Thornton v. State, 313 So. 2d 16, 18 (Miss. 1975)(failure to object to questions concerning previous convictions).

the objection must also be both specific[75] and timely,[76] and the ground of objection may be preserved, even though not stated, if it is apparent from the context.[77]

Mississippi law is also consistent with rule 103(a)(2); when an objection is sustained and no offer of the evidence is made, no error can be shown.[78] The court has indicated, however, that reversal may be allowed if the reason for admissibility is apparent from the record.[79]

In keeping with rule 103(b), there is authority in Mississippi for a trial judge to make a record of the reasons for his rulings.[80] No good reason appears why a state court cannot also direct the form of offer to expedite trial. Both should be within the sound discretion of the presiding judge. Similarly, it is suggested that Mississippi trial judges have discretion in controlling the extent to which offers, questions and comments concerning the admissibility of evidence are made in the presence of the jury.[81]

Mississippi Supreme Court Rule 6(b)[82] is in accord with the plain error concept embodied in rule 103(d). No case has been found in which the plain error rule was applied to reverse admission or exclusion of evidence in the absence of objection or offer at the trial level. However, the court has used the rule to justify reversal where evidence was admit-

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[75] *See* Allen v. State, 230 Miss. 740, 743, 93 So. 2d 844, 845 (1957) (mere objection that confession was not voluntarily given is insufficient where counsel did not specifically state the infirmity in the confession); Kroger Grocery & Baking Co. v. Harpole, 175 Miss. 227, 241, 166 So. 335, 340 (1936) (admission of evidence not reversible error where proper grounds of objection were not stated).

[76] *See* Anderson v. Jaegar, 317 So. 2d 902, 906 (Miss. 1975) (objection must be made when error is apparent); Jones v. Welford, 215 So. 2d 240, 242 (Miss. 1968) (objection must be made when ruling on admissibility is made).

[77] *See* Nash v. State, 253 Miss. 715, 716, 178 So. 2d 867, 868 (1965) (defense counsel did not make specific objection, but used "words that were sufficient to point out to the trial judge that this was one of the grounds on which he was objecting").

[78] *See* Brown v. State, 338 So. 2d 1008, 1009-10 (Miss. 1976) (counsel failed to show relevance of excluded testimony); Russell v. Mississippi Cent. R.R., 239 Miss. 741, 750, 125 So. 2d 283, 286 (1960)(no error where counsel did not indicate substance of a witness' excluded response); Shaw v. Bula Cannon Shops, 205 Miss. 458, 472-73, 38 So. 2d 916, 919 (1949) (no reversible error where counsel failed to show relevance of proffered exhibit).

[79] *See* Wash v. State, 241 So. 2d 155, 157 (Miss. 1970) (no reversible error where the record did not reflect the reason for a question).

[80] *See* Ratliff v. State, 313 So. 2d 386, 388 (Miss. 1975) ("[A] judge may explain his rulings in admitting evidence or in sustaining or overruling objections.").

[81] *See* Cutchens v. State, 310 So. 2d 273, 280 (Miss. 1975) (no reversible error where judge allowed offer of evidence in the presence of the jury).

[82] MISS. SUP. CT. R. 6(b) provides: "No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified."

ted over objection at the trial level even though the point was not raised on appeal.[83] Furthermore, the court applied the substance of the plain error rule to an evidentiary issue in *Henry v. State*,[84] even though it did not cite the rule. The court stated that defense counsel's failure to object to the admission of evidence is a waiver of the right to object, but qualified this by noting that the rule may be relaxed if its application would defeat justice.[85]

If Mississippi enacts rules of evidence, a rule similar to Federal Rules of Evidence 103 should be included to provide a guide for reference in order to minimize confusion and delay during trial. Clarification of the extent of trial judges' discretion in forming the offer and in conducting hearings on admissibility in the presence of the jury would also enhance state practice.

Rule 104. Preliminary Questions[86]

The admissibility of evidence generally depends on the resolution of a number of preliminary questions. Rule 104(a) and (b) establish the respective functions of judge and jury in such determinations. The competence of otherwise relevant evidence may be attacked on the grounds

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[83] *See* Boyd v. State, 204 So. 2d 165, 172 (Miss. 1967) (evidence held inadmissible where plain error appeared from the record).

[84] 253 Miss. 263, 174 So. 2d 348 (1965).

[85] *Id.* at 287, 174 So. 2d at 351. The court's finding that counsel had deliberately waived the right to object, *id.*, indicates a restrictive approach to the application of the plain error concept. This view probably accords with the approach taken by most federal courts. See note 71 and accompanying text *supra*.

[86] Fed. R. Evid. 104 provides:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
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> (c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.
>
> (d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.
>
> (e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

See Criminal Law ⚖ 667-71; Trial ⚖ 43-50; Witnesses ⚖ 277(1).

that a witness is unqualified, that a privilege is applicable, or that the evidence is unreliable.[87] Rule 104(a) provides that such preliminary questions of competence are to be determined by the court.[88] Such a position is necessary, since disclosure to the jury for a determination of competence and admissibility would contravene the purpose of an exclusionary rule. In order to effectuate the purposes of rule 104, the judge is not bound by other rules of evidence, except those regarding privileges, in making his determination.[89]

Rule 104(b) provides that questions of conditional relevance are to be determined by the jury rather than by the judge. Conditional relevance exists when the relevance of evidence depends upon the establishment of other preliminary facts.[90] For example, in a personal injury suit based on the doctrine of respondeat superior, evidence of a third party's negligence may be irrelevant unless the third party is shown to be the defendant's employee. The judge may admit conditional evidence if he believes that the necessary conditions will be proved later to the satisfaction of a reasonable jury.[91] If the evidence is entered in this manner, its admissibility is subject to the offeror's later proof of the preliminary facts.[92] Practitioners must remember that if the court has admitted evidence subject to a later showing of its relevance, a motion to strike is necessary if the condition is not subsequently fulfilled.[93]

Rule 104(c) grants the judge discretion to hold preliminary hearings outside the jury's presence.[94] However, where the hearing concerns the admissibility of a confession or where a criminal defendant requests that a hearing on the admissibility of his evidence be conducted in the absence of the jury, there is no discretion and the hearing must be conducted outside the presence of the jury.[95] Subdivision (d) of rule 104

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[87] 1 WEINSTEIN'S EVIDENCE ¶ 104[01], at 104-10 (1976).

[88] This general statement must be read in conjunction with other rules which determine the manner in which certain preliminary questions are dealt with. *See* FED. R. EVID. 601 & 602 (competency of witnesses); *id.* 901 (identification); *id.* 1008 (writings).

[89] *Id.* 104(a), Advisory Comm. Note. The court may receive information which would not be available to the jury in its deliberations. Federal courts followed this practice prior to the effective date of the Federal Rules of Evidence, and have continued to do so since their enactment. *Compare* United States v. De La Fuente, 548 F.2d 528, 532-33(5th Cir. 1977) (rule 104(a) merely a recodification of accepted legal principle) *and* United States v. Lee, 541 F.2d 1145, 1146 (5th Cir. 1976) (same) *with* United States v. Bolin, 514 F.2d 554, 557 (7th Cir. 1945) (hearsay evidence admissible in hearing on motion to suppress).

[90] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5053, at 263-64.

[91] 1 WEINSTEIN'S EVIDENCE ¶ 104[02], at 104-22 (1976).

[92] FED. R. EVID. 104(b).

[93] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5054, at 269-70.

[94] This rule is an expression of the same policy embodied in rule 103(c) preventing harmful prejudicial evidence from being suggested to the jury.

[95] FED. R. EVID. 104(c).

further protects an accused who testifies on a preliminary matter in the presence of a jury by limiting the scope of his cross-examination to that preliminary matter.[96] Thus, the defendant has no need to rely on the privilege against self-incrimination, which could result in prejudice to his case.[97] In actuality, however, rule 104(d) is unlikely to be used often, since under 103(c) a defendant testifying on preliminary matters may request a hearing outside the presence of the jury.[98]

The rule 104 provisions regarding preliminary questions appear to be substantially the same as the rules applied in Mississippi state courts. Preliminary questions are generally reserved for the court,[99] and the principle of conditional relevancy has long been recognized by the Mississippi Supreme Court.[100] No case has been found, however, in which the court approved a general holding that judges are not bound by the rules of evidence in hearings on admissibility.[101] Nonetheless, adoption of such a rule could be viewed as a logical extension of the accepted practice of allowing informant hearsay evidence to support issuance of search warrants.[102] Mississippi law follows the rule 103(c) provision that hearings on the admissibility of confessions must be held out of the presence of the jury,[103] as well as the 103(d) limitations on the cross-examination of a defendant who testifies on preliminary matters.[104]

Rule 105. Limited Admissibility[105]

Rule 105 expresses the accepted theory that when evidence is ad-

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[96] Fed. R. Evid. 104(d).

[97] 21 C. Wright & K. Graham, *supra* note 1, § 5057, at 295.

[98] See note 95 and accompanying text *supra.*

[99] *See* Ratliff v. State, 317 So. 2d 403, 404 (Miss. 1975) (voluntariness of a statement and its admissibility is a question for the court); Pearl River Valley Water Supply Dist. v. Wood, 252 Miss. 580, 599, 172 So. 2d 196, 204 (1965) (competency and relevancy are questions of law).

[100] *See* Lake v. Munford, 12 Miss. (4 S. & M.) 312, 319-20 (1845) ("if the evidence be shown to be relevant at any time during the trial, it is sufficient").

[101] *Cf.* 21 C. Wright & K. Graham, *supra* note 1, § 5055, at 273 (rule 104(a) not in accord with bulk of state case law).

[102] *Compare* United States v. Matlock, 415 U.S. 164, 174-75 (1974) (analogizing general rule of hearings on admissability with search warrant applications) *with* Strode v. State, 231 So. 2d 779, 782-84 (Miss. 1970) (allowing the judge to hear hearsay evidence to support a preliminary finding of probable cause).

[103] *See* Agee v. State, 185 So. 2d 671, 673 (Miss. 1976) (hearing on admissibility of confession is to be conducted outside the presence of the jury).

[104] *See* Hawkins v. State, 193 Miss. 586, 592-93, 10 So. 2d 678, 679 (1942) (defendant did not subject himself to cross-examination on other matters by testifying in a preliminary inquiry).

[105] Fed. R. Evid. 105 provides:

missible on any issue in a case, the proponent is entitled to have it considered by the jury regardless of the fact that it is inadmissible on all other issues.[106] Limited admissibility applies in two situations: first, when two or more parties are involved and evidence is admissible against one party but not against the other; second, when evidence is admissible for one purpose but is not admissible on other issues in the case.[107] Rule 105 must be considered in connection with rule 403(a) which requires exclusion of evidence when "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."[108] The Advisory Committee's notes to the federal rules emphasize the necessity of construing rule 105 and rule 403(a) together, pointing out that a "close relationship" exists between the two.[109]

When evidence of limited admissibility is offered, rule 105 provides that counsel for other parties may request that the court restrict the evidence to the scope of its admissibility and instruct the jury that the evidence is restrictively admitted.[110] The rule contains no restrictions as to who may request the limitation; thus, even the party offering the evidence may request a limiting instruction.[111] However, an opposing attorney who wishes to limit evidence in this matter must object to its admissibility for all purposes; consequently, a request under rule 105 must also meet the rule 103(a)(1) requirements of timeliness and specificity.[112] In addition to objecting to admissibility for all purposes, counsel may also request that the court instruct the jury on the limitations. Failure to request a jury instruction on limited admissibility will prevent appeal on that point.[113] Unlike the request to limit the scope of evidence, however, the request to instruct the jury on such limitations may be made either at the time evidence is admitted or when the gen-

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When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

See Criminal Law ⚖ 783; Federal Civil Procedure ⚖ 2173; Trial ⚖ 207.

[106] 1 WEINSTEIN'S EVIDENCE ¶ 105[02], at 105-9,-10 (1976).

[107] FED. R. EVID. 105, see note 105 *supra*..

[108] FED. R. EVID. 403(a). *See generally* Brand, *Relevancy and its Limits*, 48 MISS. L.J. 935 (1977).

[109] FED. R. EVID. 105, Advisory Comm. Note. *See generally* Note, *Evidence Admissible for a Limited Purpose—The Risk of Confusion Upsetting the Balance of Advantage*, 16 SYRACUSE L. REV. 81 (1964).

[110] FED. R. EVID. 105.

[111] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5065, at 325-26.

[112] See notes 48 through 52 and accompanying text *supra*.

[113] *See* United States v. Conley, 523 F.2d 650, 654 (8th Cir.) (failure to request limiting instructions prevents appeal), *cert. denied*, 424 U.S. 920 (1975).

eral charge to the jury is made.[114]

The applicability of rule 105 in joint trials of criminal defendants may result in constitutional infirmities. For example, under the limited admissibility concept of rule 105, a confession of one codefendant which implicates another defendant could be admitted into evidence.[115] Although the Supreme Court had earlier ruled that admissibility under these circumstances was permissible,[116] the Court's decision in *Bruton v. United States*[117] held that a confession used in this manner violated the confrontation clause of the sixth amendment.[118]

The Mississippi court allows admission of evidence which is admissible only as to one party[119] or for one purpose.[120] Counsel must affirmatively request that the court limit the effect of the evidence and instruct the jury on the limitation.[121]

Rule 106. Remainder of or Related Writings or Recorded Statements[122]

Rule 106 is a partial codification of the common law doctrine of completeness, which requires that when written or oral evidence is introduced "the whole of the utterance on a single topic or transaction must be taken together."[123] The purpose of the completeness doctrine and of rule 106 is to prevent one party from taking unfair advantage of the other by presenting evidence out of context.[124] In contrast to this all-encompassing doctrine, rule 106 is limited to written or recorded statements. Although the Advisory Committee's note says that rule 106 does

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[114] 1 Weinstein's Evidence ¶ 105[05], at 105-34 (1976). Despite this flexibility, an immediate request for a limiting instruction may be preferable. If the jury is not instructed when evidence is introduced that it is limited, they may assume its application to all issues and form opinions which a later instruction cannot reverse. *Id.* at 105-34 to -36.

[115] 21 C. Wright & K. Graham, *supra* note 1, § 5064, at 315.

[116] Delli Paoli v. United States, 352 U.S. 232, 243 (1957).

[117] 391 U.S. 123 (1968).

[118] The Court found that limiting instructions were insufficient to protect the defendant's constitutional rights. *Id.* at 137.

[119] Cain v. State, 253 Miss. 368, 378, 175 So. 2d 638, 642 (1965).

[120] Freed v. Killman, 192 Miss. 643, 647, 6 So. 2d 909, 910 (1942).

[121] Murphy v. State, 336 So. 2d 213, 217 (Miss. 1976); Blade v. State, 240 Miss. 183, 188, 126 So. 2d 278, 280 (1961).

[122] Fed. R. Evid. 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

See Criminal Law ⚿ 396; Evidence ⚿ 155; Federal Civil Procedure ⚿ 1183.

[123] 1 J. Wigmore, *supra* note 49, § 18, at 330.

[124] 21 C. Wright & K. Graham, *supra* note 1, § 5072, at 342.

not apply to conversations,[125] neither the rule nor the note defines "writings" or "recorded statements."[126] While depositions are not within the scope of rule 106,[127] interrogatories, answers,[128] and tape recordings of statements[129] are.

There is a conflict among writers as to whether otherwise inadmissible evidence can be introduced under rule 106 on the grounds that it is necessary to a fair understanding of an admissible writing or recorded statement. Judge Weinstein takes the position that such additional material must be admissible evidence.[130] Professors Wright and Graham disagree, basing their view on Congress' rejection of a proposal to limit rule 106 to "otherwise admissible evidence."[131] Moreover, rule 102 requires that the rules of evidence be construed to acheive "fairness in administration."[132] Arguably this canon of construction would not support an interpretation of rule 106 "that would permit a party to introduce evidence out of context . . . and then assert an exclusionary rule to bar exposure of his deception."[133] In *Davis v. State*[134] the Mississippi court endorsed this approach, allowing introduction of additional material which was not otherwise admissible.[135]

Rule 106 states that an adverse party may "require" introduction of the additional material. Again, the request should meet the rule 103 requirements of timeliness and specificity.[136] Furthermore, the proper time to request completeness will usually be when the document is formally introduced into evidence. But if the misleading character of the evidence is not immediately apparent, the request may be made at a later time.[137]

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[125] FED. R. EVID. 106, Advisory Comm. Note.

[126] The definition of "writings and recordings" in Article X, although limited to that article, may provide some guidance. FED. R. EVID. 1001(1) provides:

> "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording or other form of data compilation.

See generally Bourdeaux & Pearce, *Contents of Writings, Recordings & Photographs*, 49 MISS. L.J. (1978).

[127] 1 WEINSTEIN'S EVIDENCE ¶ 106[04], at 106-20, -21 (1976) (depositions continue to be controlled by FED. R. CIV. P. 32(a)(4)).

[128] *See* 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5073, at 351.

[129] *Id.* at 352.

[130] 1 WEINSTEIN'S EVIDENCE ¶ 106[01], at 106-12. (1976).

[131] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5078, at 375.

[132] FED. R. EVID. 102.

[133] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5078, at 376.

[134] 230 Miss. 183, 92 So. 2d 359 (1957).

[135] *Id.* at 188, 92 So. 2d at 361.

[136] See notes 48 through 52 and accompanying text *supra*.

[137] 21 C. WRIGHT & K. GRAHAM, *supra* note 1, § 5076, at 361.

Conclusion

The general provisions of the Federal Rules of Evidence contain basic rules of evidentiary procedure necessary for orderly disposition of questions of admissibility. Since these provisions are not substantive rules upon which an evidentiary decision would normally be based, the cases dealing with the rules are scarce. Although the rules are of such a nature that they will usually be applied subconsciously, the practitioner should become familiar with them, since some changes have been made in former procedure. Because there is a lack of Mississippi authority in several areas covered by the first six rules, similar rules in a state code of evidence would be of great usefulness to the practitioner.

JUDICIAL NOTICE

From a cursory inspection the concept of judicial notice appears deceptively simple since courts merely accept certain propositions without requiring formal proof. On closer examination, however, the subject becomes perplexing because the theories and rationales behind the propriety of taking judicial notice are seldom fully explained by the courts. This difficulty is compounded when one realizes that the doctrine of judicial notice may stand for many different things.[1] First, judicial notice can represent a concept of judicial reasoning; it can also encompass a theory of evidence; finally, it may be considered a procedural device. Because of the various possibilities and especially because of the lack of judicial guidance, the drafters of rule 201 of the Federal Rules of Evidence were forced to draw extensively from scholarly works on judicial notice rather than from case law.[2] This writing must also draw upon those works to establish an analytical framework within which to examine the law of judicial notice.[3]

I. Judicial Notice of Facts and Truths

A. *Distinction Between Adjudicative and Legislative Facts*

Two distinct types of facts and truths can be established in a lawsuit: adjudicative and legislative. This distinction was established and refined by Professor Kenneth C. Davis[4] and has been approved and

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[1] J. Thayer, A Preliminary Treatise on Evidence at the Common Law 277 (1898). Judicial notice has roots in the canon and civil law as a subject of judicial process and legal reasoning. *Id.* at 279. *See also* note 13 *infra*. Although judicial notice is now commonly treated in works pertaining to evidence, it was not considered related to evidence until 1827, and even then by an author more politically than legally oriented. J. Bentham, Rationale of Judicial Evidence 256-57 (1827). The year following the publication of Bentham's book, however, saw judicial notice treated as a matter of evidence by a legal treatise. T. Starkie, A Practical Treatise of the Law of Evidence 400 (1828). Although it is considered an evidentiary item, judicial notice conceptually belongs to the subjects of legal reasoning and judicial process. As Professor Thayer noted:

> The careful observer will notice that a very great proportion of the cases involving judicial notice raises no question at all in that part of the law; they relate to pleading, to the construction of the record or of other writings, the legal definition of words, the interpretation of conduct, the process of reasoning, and the regulation of trials. In short, the cases relate to the exercise of the function of judicature in all its scope and at every step.

J. Thayer, *supra* at 279.

[2] *See generally* Fed. R. Evid. 201, Advisory Comm. Note.

[3] *See generally id.*

[4] 2 K. Davis, Administrative Law Treatise § 15.03, at 353 (1958); Davis, *Judicial Notice*, 55 Colum. L. Rev. 945, 952 (1955); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 402 (1942).

adopted by most authorities.[5] "Adjudicative facts" are the facts and truths that are peculiar to a particular case and explain, among other things, who did what to whom, when, where, how and why.[6] Once those facts are established, existing law is applied to them to determine the outcome of the case.[7] "Legislative facts," on the other hand, are the facts, truths, and assumptions a judge considers when faced with the task of creating law.[8] Rather than explaining who did what to whom, when, where, how and why, legislative facts explain social, economic, and political necessities.[9] Thus, when a judge creates law by interpreting a constitution[10] or statute,[11] or by reaffirming or overruling a common law rule,[12] legislative facts will delineate the type of law needed by individuals, government, and society. Once the law has been established, it is applied to the adjudicative facts of the particular case and to those of all future cases through the doctrine of stare decisis.

The question of whether judicial notice should be taken of an adjudicative proposition is governed by a simple legal test.[13] Notice should

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[5] *E.g.*, C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 328, at 759 (2d (E. Cleary) ed. 1972); Hefflinger, *Proposed Rule Broadens Scope of Judicial Notice*, 53 NEB. L. REV. 333, 335 (1974); Comment, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528, 531-33 (1968). *But see* Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 161 (1973) ("the distinction . . .. may often be elusive"); Note, *Judicial Notice: Rule 201 of the Federal Rules of Evidence*, 28 U. FLA. L. REV. 723, 743 (1976) ("the distinction is not always a simple one"). The distinction between adjudicative and legislative facts was incorporated into FED. R. EVID. 201. See notes 55 & 56 and accompanying text *infra*.

[6] 2 K. DAVIS, *supra* note 4, § 15.03, at 353.

[7] *Id.*

[8] *Id.*

[9] C. McCORMICK, *supra* note 5, § 328, at 759.

[10] *E.g.*, Roe v. Wade, 410 U.S. 113, 152-55 (1973) (right of privacy encompasses woman's decision to terminate pregnancy); Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954) (racial segregation has a detrimental effect on black children); Mississippi State Highway Comm'n v. Roberts Enterprises, Inc., 304 So. 2d 637, 640 (Miss. 1974) (preservation of natural beauty and historic sites promotes general welfare of the state).

[11] *E.g.*, Potts v. Coe, 140 F.2d 470, 477 (D.C. Cir. 1944) (patent resulting from collective enterprise of company's employees normally becomes property of the company); Teche Lines, Inc. v. Danforth, 195 Miss. 226, 251, 12 So. 2d 784, 787 (1943) (en banc) (85% of Mississippi's highways are, in most places, too narrow to allow clearance required by statute).

[12] *E.g.*, Hawkins v. United States, 358 U.S. 74, 77-80 (1958) (common law rule forbidding testimony by one spouse against the other may be modified); Burnley v. State, 201 Miss. 234, 238-39, 29 So. 2d 94, 95-96 (1947) (en banc) (ignorance of the law is no defense in a bigamy prosecution).

[13] The question of whether judicial notice of a fact should be taken is a question of law since the answer must be based on what the court judicially knows and not what the judge actually knows. Since the year 1406, judges have been barred from using their personal knowledge when taking judicial notice of adjudicative facts.

Tirwhit: Sir, let us put the case that a man kills another in your presence

be taken[14] where the proposition is known to be a fact or truth as a matter of common knowledge by reasonably intelligent people in the community where the lawsuit arose.[15] When a court requires no formal proof of the proposition that gasoline is explosive, and to that proposition applies the existing law of negligence,[16] judicial notice has been taken of an adjudicative fact that is a matter of common knowledge. Cognizance should also be taken of any proposition that can be readily ascertained as fact or truth by resort to sources of information the accuracy of which is not subject to reasonable dispute.[17] Notice is taken of

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and sight, and another who is not guilty is indicted before you and is found guilty of the same death, you ought to respite the judgment against him, for you know the contrary, and report the matter to the King to pardon him. No more ought you to give judgment . . . . Gascoigne, C.J. One time the King himself asked me about this very case which you have put, and asked me what was the law, and I told him just as you say, and he was well pleased that the law was so.

Anon., Y.B. Hen. 4, f. 41, pl. 5 (1406), *reprinted in* C. McCormick, *supra* note 5, § 329, at 761 n.30.

The Mississippi Supreme Court has noted:

> It is a settled maxim, that a judge has a private and a judicial knowledge. But he cannot give a judgment upon his private knowledge; for he is obliged to give it according to law and what is proved. If he has a private knowledge of a fact, he may be sworn as a witness, and then the parties have an opportunity to examine and cross-examine him, and to introduce explanatory or counteracting proof . . . . [If the judge] finds a verdict, upon his mere private knowledge, it is error, and the verdict will be set aside.

Smith v. Moore, 4 Miss. (3 Howard) 40, 42 (1838); *accord,* Harris v. Pounds, 185 Miss. 688, 695, 187 So. 891, 893 (1939) (information within common knowledge of jury is subject to judicial notice); *cf.* Gulf, M. & N.R.R. v. Weldy, 193 Miss. 59, 64-65, 8 So. 2d 249, 251 (1942) (en banc) (juries to be left free to integrate common knowledge into their reasoning, without judicial instruction). For a discussion of judicial notice of legislative facts, see notes 25 through 31 and accompanying text *infra.*

[14] Judicial notice of a particular fact may be requested by either litigant or invoked by the court. *See, e.g.,* Kelly v. Fulkerson, 275 F. Supp. 134, 138 (M.D. Pa. 1967) (invocation by plaintiff), *aff'd per curiam,* 394 F.2d 463 (3d Cir. 1968); United States v. Harris, 331 F.2d 600, 601 (6th Cir. 1964) (invocation by court sua sponte).

[15] *See* Varcoe v. Lee, 180 Cal. 338, 181 P. 223, 227 (1919) (common knowledge that Mission Street in San Francisco is a business district); McGill v. City of Laurel, 252 Miss. 740, 764, 173 So. 2d 892, 903 (1965) (commonly known that "countless" Mississippi farms have ponds and the like); Harris v. Pounds, 185 Miss. 688, 695-96, 187 So. 891, 893 (1939) (en banc) (since weight of an unknown hardwood log of given dimensions was not a matter of common knowledge, judicial notice of weight was improper); Coward v. State, 158 Miss. 705, 712, 131 So. 254, 256 (1930) (common knowledge that Hammond, Louisiana, is within a few hours of Scott County, Mississippi).

[16] Murry Chevrolet Co. v. Cotton, 169 Miss. 521, 528, 152 So. 657, 658 (1934); *cf.* W.G. Avery Body Co. v. Hall, 224 Miss. 51, 65-66, 79 So. 2d 453, 457-58 (1955) (judicial notice that large light bulb will radiate heat upon a nearby surface).

[17] Witherspoon v. State, 138 Miss. 310, 320, 103 So. 134, 136-37 (1925) (en banc) (court may take notice of any fact from "any source of knowledge . . . helpful to the

such a fact when a court requires no formal proof of the proposition that a certain date fell on a certain day of the week,[18] and to that proposition applies the existing law of contract.[19] But no matter how adjudicative facts are established,[20] be it by pleading,[21] stipulation,[22] formal evidence,[23] or judicial notice,[24] they are always the facts to which existing law is applied.

While judicial notice of adjudicative facts is a matter of evidence, judicial notice of legislative facts forms a part of the judicial process.[25] Notice of legislative facts also differs in that no restrictions are placed on a judge when he is dealing with legislative facts;[26] propositions need not be a matter of common knowledge or readily ascertainable. Indeed, a judge will often work from assumptions and personal experiences.[27] Since a judge is acting as a legislator when considering legislative facts, he must be able to examine and interpret social, economic, historical, and political data with as few restrictions as possible.[28] For example, when a court takes notice of a state's ecological history in holding constitutional a statute requiring the removal of roadside signs without compensation,[29] it takes notice of legislative facts. Legislative facts are like-

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court"); *see, e.g.*, Baenitz v. Ladd, 363 F.2d 969, 970 (D.C. Cir. 1966) (judicial notice of scientific data); Connor v. Johnson, 256 F. Supp. 962, 965 (S.D. Miss. 1966) (judicial notice of United States Census), *aff'd per curiam*, 386 U.S. 483 (1967).

[18] Morgan v. Burrow, 16 So. 432, 432 (Miss. 1894); Shenandoah Life Ins. Co. v. Harvey, 242 F. Supp. 680, 682 (D. Md. 1965); *cf.* Oliver v. Hallett Constr. Co., 421 F.2d 365, 367 (8th Cir. 1870) (judicial notice of time of sundown).

[19] *Cf.* note 16 and accompanying text *supra* (common knowledge standard).

[20] *See generally* Keeffe, Landis & Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664 (1950).

[21] *E.g.*, Mississippi State Highway Comm'n v. West, 181 Miss. 206, 221, 179 So. 279, 283 (1938).

[22] *E.g.*, Bridges v. Bridges, 330 So. 2d 260, 262-63 (Miss. 1976).

[23] *E.g.*, Daniels v. Cook Broadcasting Co., 357 F.2d 649, 650 (10th Cir.) (oral testimony), *cert. denied*, 385 U.S. 904 (1966); Illinois Cent. R.R. v. Threefoot Bros. & Co., 121 Miss. 468, 478, 83 So. 635, 635 (1919) (documentary evidence).

[24] *E.g.*, Shenandoah Life Ins. Co. v. Harvey, 242 F. Supp. 680, 682 (D. Md. 1965).

[25] See note 56 and accompanying text *infra*.

[26] C. MCCORMICK, *supra* note 5, § 333, at 772; FED. R. EVID. 201 (a), Advisory Comm. Note; *see* Hahn v. Gottlieb, 430 F.2d 1243, 1248 (1st Cir. 1970) ("when decision turns on 'legislative' . . . facts, a formal adversary hearing may contribute little or nothing . . . .").

[27] *See* Furman v. Georgia, 408 U.S. 238, 313 (1972) (conclusion based on "10 years of almost daily exposure to the facts and circumstances") (White, J., concurring).

[28] *See generally* Roe v. Wade, 410 U.S. 113 (1973); Hawkins v. United States, 358 U.S. 74 (1958); Brown v. Board of Educ., 347 U.S. 483 (1954); Potts v. Coe, 140 F.2d 470 (D.C. Cir. 1944); Mississippi State Highway Comm'n v. Roberts Enterprises, Inc., 304 So. 2d 637 (Miss. 1974).

[29] Mississippi State Highway Comm'n v. Roberts Enterprises, Inc., 304 So. 2d 637, 640 (Miss. 1974).

wise noticed when a court examines the nature of marriage in reaffirming the common law rule of testimonial marital incompetence.[30] Judicial notice of legislative facts, therefore, is not a matter of evidence at all, but rather a device by which a judge considers the world around him when faced with the task of determining what the law shall be.[31]

B. Procedural Incidents and Effects of Judicial Notice of Adjudicative Facts: The Wigmore-Morgan Controversy

Two schools of thought exist as to the procedural incidents and effects of a court's taking or being asked to take judicial notice of an adjudicative fact. This division of thought is often called the Wigmore-Morgan controversy[32] because of those authors' classic analyses of judicial notice.[33] Although their conclusions are antithetical, Professor Wigmore's and Professor Morgan's goals are the same: to clarify the general principles of the doctrine of judicial notice, to point out the possible procedural requirements and effects, and to give the courts a more structured framework in which to use the doctrine equitably and effectively.[34]

Professor Wigmore's position is that a judicially noticed adjudicative fact is equal to a presumption[35] and can thus be rebutted by formal evidence.[36] According to Wigmore, a court is free to notice propositions that are not likely to be challenged as well as those that are indisputable.[37] Professor Morgan's position, on the other hand, is that a judicially noticed adjudicative fact is conclusive[38] and immune to rebuttal.[39] Judicial notice under Morgan's procedure would therefore be limited to indisputable matters.[40] The two theories thus differ with respect to the scope of matters judicially noticeable and the permissibility of rebuttal evidence.

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[30] Hawkins v. United States, 358 U.S. 74, 77-80 (1958).

[31] C. McCormick, *supra* note 5, § 331, at 766-69; *see, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (police power includes authority to exclude apartment houses from residential districts).

[32] Hefflinger, *supra* note 5, at 336-37; Keeffe, Landis & Shaad, *supra* note 20, at 667-71; McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy,* 14 Vand. L. Rev. 779, 779-80 (1961).

[33] 9 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law §§ 2565-2583 (3d ed. 1940); Morgan, *Judicial Notice,* 57 Harv. L. Rev. 269 (1944).

[34] 9 J. Wigmore, *supra* note 33, § 2583, at 585; Morgan, *supra* note 33, at 269, 274.

[35] 9 J. Wigmore, *supra* note 33, § 2567, at 535; *Accord,* J. Thayer, *supra* note 1, at 308.

[36] 9 J. Wigmore, *supra* note 33, § 2567, at 535.

[37] *Id.* § 2571, at 548.

[38] Morgan, *supra* note 33, at 279; *accord,* McNaughton, *supra* note 32, at 779.

[39] Morgan, *supra* note 33, at 279.

[40] *Id.*

Procedures under the Wigmore and Morgan theories do not begin to differ until a judge actually takes judicial notice of an adjudicative proposition and instructs the jury. Before notice is actually taken, both the proponent and opponent of the proposition can submit information to the judge to help him decide whether judicial notice is appropriate.[41] The Wigmore procedure allows the judge to take notice of the proposition if he initially holds it commonly known or readily ascertainable.[42] The judge will then instruct the jury that it *may* accept the proposition without formal evidence having been introduced.[43] The opponent may seek a reversal of notice by producing more information showing that the proposition is neither a matter of common knowledge nor readily ascertainable.[44] If the judge is persuaded notice should not have been taken, he can reverse himself, instruct the jury of his reversal, and the proponent will be forced to establish the proposition by conventional means of proof.[45] But even if the judge refuses to reverse himself, the opponent may still produce formal evidence to the jury to rebut the presumption established by judicial notice.[46]

The Morgan procedure is somewhat simpler since the judge's decision is final and no rebuttal is allowed.[47] If judicial notice is taken, the judge will instruct the jury that the proposition is indisputable[48] and that it *must* be accepted without the introduction of formal evidence.[49] Once notice is taken and the instruction is given, the parties may pursue the matter no further[50] except by appeal.[51]

C. *Judicial Notice of Adjudicative Facts under Rule 201 of the Federal Rules of Evidence*

Prior to the enactment of rule 201 of the Federal Rules of Evidence,[52] judicial notice in the federal courts was governed by common

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[41] 9 J. WIGMORE, *supra* note 33, § 2568a, at 537; Morgan, *supra* note 33, at 286-87.

[42] 9 J. WIGMORE, *supra* note 33, § 2567, at 535.

[43] *Id.*

[44] *Id.* § 2568a, at 538.

[45] *Id.*

[46] *Id.* § 2567, at 535.

[47] Morgan, *supra* note 33, at 279.

[48] *Id.* at 293.

[49] *Id.* (citing ALI CODE OF EVID. 805 (1942)).

[50] Morgan, *supra* note 33, at 287.

[51] *See* Morgan, *supra* note 33, at 293; McNaughton, *supra* note 32, at 780-81; Note, *supra* note 5, at 727-29; Comment, *supra* note 5, at 531-33. See note 65 and accompanying text *infra*.

[52] FED. R. EVID. 201 provides:

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to

law.[53] Much of the pre-rule law will not change[54] since rule 201 governs only judicial notice of adjudicative facts.[55] Judicial notice of legislative facts will continue to be governed by common law because "they are in reality human knowledge and . . . not an appropriate subject of regulation by rules of evidence."[56] Judicial notice of law will continue to be governed by the Federal Rules of Procedure[57] and by common law because "the manner in which law is fed into the judicial process is [not a] concern of the rules of evidence but rather of the rules of procedure."[58] Rule 201 is therefore strictly a rule of evidence that can be used to establish adjudicative facts without formal evidence.[59]

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reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

See Criminal Law ⇦- 304(1)-(8); Evidence ⇦ 1-26; Trial ⇦202.

[53] *See generally* Grand Opera Co. v. Twentieth Century-Fox Film Corp., 235 F.2d 303, 307-08 (7th Cir. 1956) (judicial notice taken of competitive trade area); Grambling v. Good Mach. & Chem. Corp., 151 F. Supp. 853, 858 (W.D.S.C. 1957) (judicial notice not taken of fact that award for damages was grossly excessive because judge had no knowledge of earning power of damaged orchards).

[54] *Hearings on Proposed Rules of Evidence before the Special Subcomm. on Reform of Federal Criminal Law of the House Comm. on the Judiciary*, Serial No. 2, 93d Cong., 1st Sess. 92 (1973) [hereinafter cited as *1973 Reform Hearings*] (statement of Judge Albert B. Maris); 1 WEINSTEIN'S EVIDENCE, ¶ 200[01], at 200-1, -2 (1975).

[55] FED. R. EVID. 201(a); *accord,* United States v. Gould, 536 F.2d 216, 219 (8th Cir. 1976) (extent of rule 201 covers only adjudicative facts and not legislative ones); Mainline Inv. Corp. v. Gaines, 407 F. Supp. 423, 426 (N.D. Tex. 1976) (economic events of case were adjudicative facts and therefore within scope of rule 201); *1973 Reform Hearings, supra* note 54, at 92 (statement of Judge Albert B. Maris); 1 WEINSTEIN'S EVIDENCE, ¶ 200[01], at 200-3 (1975).

[56] *1973 Reform Hearings, supra* note 54, at 92 (statement of Judge Albert B. Maris).

[57] *See* FED. R. CRIM. P. 26.1; FED. R. CIV. P. 44.1. *See also* Hefflinger, *supra* note 5, at 340-41.

[58] FED. R. EVID. 201, Advisory Comm. Note.

[59] See notes 6 & 7 and accompanying text *supra.*

Rule 201 operates under the Morgan theory[60] — the subject matter of judicial notice must not be subject to reasonable dispute[61] and once notice has been taken it is conclusive[62] so long as prior notification and opportunity to be heard have been given to all adversary parties.[63] The Morgan procedure was adopted by the drafters for three primary reasons. First, the purpose of judicial notice is not to establish presumptions but rather to remove uncontested issues from the jury's province.[64] Second, the contested use of judicial notice is better argued before a court of appeals than before a jury.[65] More important, however, was the drafters' third reason: to produce a fair and uncomplicated rule of judicial notice of adjudicative facts.[66]

No particular formal procedure is required by rule 201.[67] The issue of judicial notice may be raised at any stage of the proceeding[68] by request of either party[69] or by the court sua sponte.[70] All parties are entitled to be heard upon request if they challenge the propriety of judicial notice.[71] When the issue is raised, a preliminary question of the type of proposition to be noticed must be answered.[72] If the proposition is determined to be an adjudicative fact, the judge will request information and arguments from the parties.[73] The fact will be judicially noticed if it is held "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[74] If all parties have

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[60] See notes 32 through 51 and accompanying text *supra*.

[61] FED. R. EVID. 201(g); *accord, e.g.*, Antco Shipping Co. v. Sidermar S.p.A., 417 F. Supp. 207, 213 (S.D.N.Y. 1976) (court refused to notice fact that clause excluding Israeli ports from a shipping contract had been placed by the defendant to "curry favor with the Arab world").

[62] FED. R. EVID. 201(g); *accord, e.g.*, United States v. Gould, 536 F.2d 216, 219 (8th Cir. 1976) (judicially noticed fact must be accepted by the jury).

[63] FED. R. EVID. 201(e).

[64] *Hearings on Proposed Rules of Evidence before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, Serial No. 2, 93d Cong., 1st Sess. 235 [hereinafter cited as *1973 Criminal Justice Hearings*] (statement of David T. Maddox).

[65] *Id.*

[66] *Id.*

[67] See note 52 *supra*.

[68] FED. R. EVID. 201(f).

[69] *Id.* 201(d).

[70] *Id.* 201(c).

[71] *Id.* 201(e).

[72] *See* United States v. Gould, 536 F.2d 216, 219 (8th Cir. 1976) (determination of type of fact).

[73] *1973 Criminal Justice Hearings, supra* note 64, at 268 (statement of Ernest B. Howard, M.D.).

[74] FED. R. EVID. 201(b); *accord, e.g.*, United States v. Gould, 536 F.2d 216, 219 (8th

had an opportunity to be heard, the noticed fact will be conclusive and further arguments precluded.[75]

Except in the area of jury instructions, rule 201 makes no distinction between civil and criminal cases. As originally drafted, no distinction whatsoever was made,[76] but in the view of the House Committee on the Judiciary,[77] a mandatory instruction requiring a jury to accept judicially noticed facts in criminal cases was not in the spirit of the sixth amendment.[78] Consequently, rule 201(g) was modified[79] to provide that a jury in a criminal case should be instructed that "it may, but is not required to, accept as conclusive any fact judicially noticed."[80] A jury in a civil case, on the other hand, should be instructed that it shall "accept as conclusive any fact judicially noticed."[81]

D. Judicial Notice of Adjudicative Facts under Mississippi Common Law

Judicial notice of adjudicative facts is governed by common law in Mississippi.[82] There is no statute similar to rule 201 of the Federal Rules of Evidence, and the Mississippi Supreme Court has never rendered a comprehensive opinion on the subject. Judicial notice has primarily been used as a device to support jury verdicts and lower court judgments that are not entirely supported by formal evidence[83] and to set aside

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Cir. 1976) (facts so unquestionable and commonly known that no party would think to present "a falsity [to] the tribunal in the face of an intelligent adversary"); Government v. Gereau, 523 F.2d 140, 147 (3d Cir. 1975) (judge cannot base judicial notice on his personal knowledge), *cert. denied*, 424 U.S. 917 (1976).

[75] FED. R. EVID. 201(g); *id.*, Advisory Comm. Note; *1973 Criminal Justice Hearings*, *supra* note 64, at 235 (statement of David T. Maddox); Note, *supra* note 5, at 729.

[76] Order, 56 F.R.D. 184, 201 (1972).

[77] H.R. REP. No. 650, 93d Cong., 2d Sess. 6, 7, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7080, 7082.

[78] *Id.; see* U.S. CONST. amend. VI, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

[79] H.R. REP. No. 650, *supra* note 77, at 7.

[80] FED. R. EVID. 201(g). For discussions of the compatibility of rule 201 with the sixth amendment, see Note, *supra* note 5, at 542-43; Comment, *Judicial Notice in the Proposed Federal Rules of Evidence*, 1969 WASH. L.Q. 453, 458.

[81] FED. R. EVID. 201(g).

[82] T. MCELROY, MISSISSIPPI EVIDENCE § 12, at 17-18 (1955).

[83] *See, e.g.*, Aultman v. Delchamps, Inc., 202 So. 2d 922, 923 (Miss. 1967) (judicial notice that persons who regularly shop in a grocery store know where items are kept, used

verdicts and reverse judgments that are supported by formal evidence contrary to common sense.[84]

Mississippi courts use a common knowledge-readily ascertainable test[85] equivalent to that provided by rule 201 of the Federal Rules of Evidence.[86] Unlike rule 201,[87] however, the Mississippi Supreme Court seems to have adopted the Wigmore procedure,[88] although it is difficult to ascertain an exact position from the paucity of judicial analyses. Facts established by judicial notice have the same weight as adjudicative facts established by formal evidence[89] and are therefore subject to rebuttal.[90] Since Mississippi's judicial notice operates to form presumptions, as opposed to conclusive facts, propositions that are likely to go unchallenged as well as those that are indisputable can be judicially noticed.[91]

Inasmuch as judicial notice can be taken of a broad range of subject matter, mandatory wording of jury instructions is inappropriate.[92] The

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to affirm negligence action); W.G. Avery Body Co. v. Hall, 224 Miss. 51, 65-66, 79 So. 2d 453, 457-58 (1955) (judicial notice that a light bulb radiates heat, used to affirm workman's compensation action).

[84] *See, e.g.*, Gulf, M. & O.R.R. v. Hollingshead, 236 So. 2d 393, 397 (Miss. 1970) (judicial notice that weight is a factor in the stopping time of a train, used to reverse negligence action); Callender v. Cockrell, 217 So. 2d 643, 647 (Miss. 1969) (judicial notice that a car's brake light indicates the car is going to stop, used to reverse negligence action).

[85] *See, e.g.*, McGill v. City of Laurel, 252 Miss. 740, 764, 173 So. 2d 892, 903 (1965) (judicial notice that there are "countless thousands of . . . natural and artificial . . . bodies of water . . . [in] this state"); Harris v. Pounds, 185 Miss. 688, 695-96, 187 So. 891, 893 (1939) (en banc) (judicial notice of the weight of a hardwood log of a given size is not a matter of common knowledge).

[86] See note 74 and accompanying text *supra*.

[87] See note 52 *supra*.

[88] *See* Armstrong v. Jones, 198 Miss. 627, 638-39, 22 So. 2d 7, 11 (1945) (judicial notice is equivalent to other forms of evidence); Gulf, M. & N.R.R. v. Weldy, 193 Miss. 59, 64-65, 8 So. 2d 249, 251 (1942) (en banc) (same).

[89] Armstrong v. Jones, 198 Miss. 627, 638-39, 22 So. 2d 7, 11 (1945).

[90] *See id.* (judicial notice is equivalent to other forms of evidence); Gulf, M. & N.R.R. v. Weldy, 193 Miss. 59, 64-65, 8 So. 2d 249, 251 (1942) (en banc) (same).

[91] *See, e.g.*, Illinois Cent. R.R. v. Buckley, 185 So. 2d 427, 429 (Miss. 1966) (judicial notice that uncured hay will sweat and rot when kept in an enclosure); Walters v. Gilbert, 248 Miss. 77, 94, 158 So. 2d 43, 51 (1963) (judicial notice of 40% decrease in purchasing power of dollar); Hull v. Scruggs, 191 Miss. 66, 71, 2 So. 2d 543, 543 (1941) (en banc) (judicial notice that a dog cannot be broken of an "egg-sucking" habit); Moss v. Mississippi Live Stock Sanitary Bd., 154 Miss. 765, 775, 122 So. 776, 779 (1929) (judicial notice that Texas Cattle Tick is a "menace"). *But see* Luckett v. Louisiana Oil Corp., 171 Miss. 570, 575, 158 So. 199, 200 (1934) ("judicial notice is to be exercised with caution").

[92] Gulf, M. & N.R.R. v. Weldy, 193 Miss. 59, 64-65, 8 So. 2d 249, 251 (1942) (en banc). Since judicial notice is a rule of evidence and not one of substantive law, judicially noticed facts should not be incorporated into the jury instructions of law. *Id.* Furthermore, the doctrine of stare decisis is inapplicable to the concept of judicial notice since one court's notice of a certain proposition does not control a later court's decision of whether notice should be taken of the same proposition. *Id.* Each time judicial notice is involved, there-

Mississippi Supreme Court has taken the position that a jury should be free to decide for itself whether a proposition should stand without formal evidence.[93] No express distinction has thus been made between civil and criminal proceedings,[94] but, because the burden of proof always weighs heavily upon the state in criminal proceedings,[95] the scope of propositions subject to judicial notice in such cases may be somewhat more narrow.[96] Still, judicial notice has been taken in a wide variety of situations in criminal cases,[97] though sufficient credible evidence will effect a rebuttal.[98]

E. Judicial Notice of Legislative Facts Under Federal and Mississippi Common Law

Neither federal nor Mississippi courts restrict which legislative facts a judge may consider when faced with the task of creating law.[99] The drafters of rule 201 correctly excluded judicial notice of legislative facts on the ground that such notice is not a matter of evidence.[100] In formulating rules of evidence, or any other legal rules for that matter, there is no effective way to deal with the personality, education, general knowledge and reasoning ability of a judge. Neither can rules deal effectively with the materials a judge uses in interpreting substantive law. Although some authorities feared that the exclusion of legislative facts

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fore, it must be shown that the proposition is either commonly known or readily ascertainable. *See id.*

[93] *See id.* ("[The jury's] mental processes should be unaffected by any suggestion by the trial court.").

[94] *Compare* Aultman v. Delchamps, Inc., 202 So. 2d 922, 923 (Miss. 1967) (in a civil case, judicial notice taken of fact that regular customers know location of goods) *with* Coward v. State, 158 Miss. 705, 712, 131 So. 254, 256 (1930) (criminal case where court took judicial notice of distance from court house to Hammond, Louisiana).

[95] *See, e.g.*, Pittman v. State, 297 So. 2d 888, 891 (Miss. 1974) (plea of self defense does not shift burden of proof to defendant); Boyd v. State, 204 So. 2d 165, 173 (Miss. 1967) (state must prove all elements of crime including defendant's connection with the crime).

[96] *Cf.* Johnson v. State, 102 So. 2d 412, 412-13 (Fla. Dist. Ct. App. 1958) (state must prove value of stolen car exceeds $100 to obtain felony conviction).

[97] *See, e.g.*, Walton v. State, 219 Miss. 72, 76, 68 So. 2d 87, 88 (1953) (judicial notice that beer is an alcoholic beverage); Augustine v. State, 201 Miss. 277, 290, 28 So. 2d 243, 246 (1946) (en banc) (judicial notice that firearms are the most often used weapons in robbery); Moran v. State, 160 Miss. 598, 602, 135 So. 209, 209 (1931) (judicial notice of ordinary meanings of words).

[98] *See* Busby v. State, 177 Miss. 68, 79, 170 So. 140, 143 (1936) (en banc) (presumptions must yield to evidence).

[99] *Compare, e.g.*, Potts v. Coe, 140 F.2d 470, 477 (D.C. Cir. 1944) (judicial notice of economic conditions) *with* Mississippi State Highway Comm'n v. Roberts Enterprises, Inc., 304 So. 2d 647, 640 (Miss. 1974) (judicial notice of ecological conditions).

[100] See note 56 and accompanying text *supra.*

from rule 201 might preclude judicial notice,[101] the Advisory Committee made it clear the exclusion was intended to encourage, rather than discourage, such notice where appropriate.

> "[T]he judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present . . . . [T]he parties do no more than to assist; they control no part of the process."[102]

Thus, neither procedural nor substantive requirements apply to judicial notice of legislative facts. The judge is free to create the law he deems best, restricted only by the appellate process.

II. Judicial Notice of Law

A. *General Principles*

Judicial notice of law includes two principles. First, to say judicial notice can be taken of any given law means that a judge is not bound by what the adversary parties say the law is.[103] If one party says law *A* is applicable and the other party says law *B* governs, a judge can accept either law *A* or *B* or reject them both and apply law *C*. Second, judicial notice of law represents the principle that a party is not required to plead and prove certain laws.[104] Both principles are grounded upon the presumption that all judges are capable of ascertaining the law,[105] but neither is an evidentiary matter.[106] The first principle is a judicial process,[107] while the second is a procedural rule.[108]

All laws are theoretically noticeable in all courts in the sense that judges, not adversary parties, control the search for the proper law. As the result of an evolutionary process of practicality, however, some laws and quasi-laws are judicially noticeable while others must be pleaded and proved.[109] Certain laws, such as foreign laws and municipal ordi-

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[101] *E.g., 1973 Criminal Justice Hearings, supra* note 64, at 317 (statement of Professor Kenneth C. Davis).

[102] Fed. R. Evid. 201(a), Advisory Comm. Note (quoting Morgan, *Judicial Notice,* 57 Harv. L. Rev. 269, 270-71 (1944)).

[103] Morgan, *supra* note 33, at 270.

[104] C. McCormick, *supra* note 5, § 335, at 776.

[105] Morgan, *supra* note 33, at 270.

[106] See notes 110 through 133 and accompanying text *infra.*

[107] Morgan, *supra* note 33, at 270; *cf.* notes 25 through 30 and accompanying text *supra* (judicial notice of legislative facts).

[108] *See* Fed. R. Evid. 201, Advisory Comm. Note.

[109] *Compare, e.g.,* Stewart v. City of Pascagoula, 206 So. 2d 325, 327 (Miss. 1968) (no

nances, have historically been treated as facts that must be pleaded and proved for the simple reason that accurate copies were unavailable to most judges unless provided by the proponent.[110] Unfortunately, this evolutionary process has confused rules of procedure with principles of judicial process and rules of evidence. A better rule would allow a judge the freedom to notice any law he deems appropriate and the power to require proof when a party raises the issue of a certain law and copies are not readily available.

B. Judicial Notice of Law in Federal and Mississippi Courts

Little difference exists between the federal and Mississippi rules pertaining to judicial notice of law. Federal courts are governed by common law,[111] subject to the provisions of the Federal Rules of Procedure concerning foreign law,[112] whereas Mississippi courts are governed by common law[113] and section 13-1-149 of the Mississippi Code.[114] But even

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judicial notice of municipal ordinances) *with* Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 577, 126 So. 395, 396 (1930) (judicial notice of sister state's law).

[110] C. McCORMICK, *supra* note 5, § 335, at 776.

[111] *See, e.g., In re* Dandridge, 186 F. Supp. 276, 280 (D.N.J. 1960) (federal courts are charged with judicial notice of federal and state law).

[112] FED. R. CIV. P. 44.1 provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

Accord, FED. R. CRIM. P. 26.1. *See generally* Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 154-55 (2d Cir.), *cert. denied,* 393 U.S. 826 (1968).

The Advisory Committee, in excluding notice of law from the rule's scope, pointed out that

> [b]y rules effective July 1, 1966, the method of invoking the law of a foreign country is covered elsewhere. Rule 44.1 of the Federal Rules of Civil Procedure; Rule 26.1 of the Federal Rules of Criminal Procedure. These two new admirably designed rules are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law, and suggests that those matters of law which, in addition to foreign-country law, have . . . been . . . the subject of judicial notice, be left to the Rules of Civil and Criminal Procedure.

FED. R. EVID. 201, Advisory Comm. Note.

[113] *See* Witherspoon v. State, 138 Miss. 310, 320, 103 So. 134, 137 (1925) (en banc) (judicial notice of Senate Journal).

[114] MISS. CODE ANN. § 13-1-149 (1972) provides:

> When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or

though the federal and state rules are essentially the same, an attempt to abstract general principles results only in a morass of noticeable and unnoticeable laws and quasi-laws. For example, both federal and Mississippi courts take judicial notice of public laws[115] of the United States,[116] of the states in which the courts sit,[117] and of other states.[118] This includes all types of law, even decisional law.[119] A foreign country's law can be noticed in both federal and Mississippi courts,[120] but such notice is subject to the Federal Rules of Procedure in federal court.[121] Executive and administrative regulations, orders, records, documents, and the like are usually held noticeable[122] so long as they are official and

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of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this state.

[115] *See* Campbell v. Muncey, 413 F. Supp. 16, 19 (N.D. Miss. 1975), *aff'd*, 542 F.2d 573 (5th Cir. 1976); Haas v. Hancock County, 183 Miss. 365, 374, 184 So. 812, 813 (1938).

[116] *E.g.*, United States v. Mercantile Trust Co., 263 F. Supp. 340, 342 (E.D. Mo. 1966), *rev'd on other grounds*, 389 U.S. 27 (1967); *In re* Dandridge, 186 F. Supp. 276, 280 (D.N.J. 1960); *see, e.g., Ex parte* York County Natural Gas Auth., 238 F. Supp. 964, 978 (W.D.S.C.) (judicial notice of Bankruptcy Act), *modified on other grounds sub nom.*, Monzingo v. York County Natural Gas Auth., 352 F.2d 78 (4th Cir. 1965), *cert. denied*, 383 U.S. 970 (1966).

Although no Mississippi case was found, MISS. CODE ANN. § 13-1-149 (1972) mandates that the courts "shall take notice" of the laws of the United States.

[117] Richards v. Town of Magnolia, 100 Miss. 249, 258, 56 So. 386, 388 (1911) (judicial notice of state law pertaining to municipalities); *see, e.g.*, McGill v. Gadsden County Comm'n, 535 F.2d 277, 279 (5th Cir. 1976) (per curiam) (judicial notice of state's election law); Williams v. Townsend, 283 F. Supp. 580, 581 (C.D. Cal. 1968) (judicial notice of state's indictment law).

[118] Gates v. P.F. Collier, Inc., 378 F.2d 888, 892 (9th Cir.) (Hawaii federal district court may take notice of laws of New York), *cert. denied*, 389 U.S. 1038 (1967); Parker v. McCaskey Register Co., 177 Miss. 347, 355, 171 So. 337, 338 (1936) (Mississippi court authorized by statute to take judicial notice of another state's laws); Floyd v. Vicksburg Cooperage Co., 156 Miss. 567, 576, 126 So. 395, 397 (1930) (same).

[119] *See* Hoyt v. Russell, 117 U.S. 401, 404 (1886) (judicial notice of unwritten territorial extent of court's jurisdiction); Keefe, Landis & Shaad, *supra* note 20, at 672.

[120] See notes 112 & 114 *supra*.

[121] See note 112 *supra*.

[122] *See, e.g.*, Hughes v. Gengler, 404 F.2d 229, 231 (9th Cir. 1968) (judicial notice of Post Office regulations), *cert. denied*, 393 U.S. 1085 (1969); International Bhd. of Teamsters v. Zantop Air Transp. Co., 394 F.2d 36, 40 (6th Cir. 1968) (judicial notice of NLRB orders); Carter v. American Tel. & Tel. Co., 365 F.2d 486, 491-92 (5th Cir. 1966) (judicial notice of tariffs), *cert. denied*, 385 U.S. 1008 (1967); *In re* Watson, 517 F.2d 465, 474 (C.C.P.A. 1975) (judicial notice of FDA order); Board of Ed. v. Wilburn, 223 So. 2d 665, 668 (Miss. 1969) (judicial notice of regulations of State Educational Finance Commission); Cockrell Banana Co. v. Harris, 212 So. 2d 581, 587 (Miss. 1968) (judicial notice of Workmen's Compensation Commission); Monsanto Chem. Co. v. Sykes, 245 Miss. 207, 220, 147 So. 2d 290, 296 (1962) (judicial notice of records of Oil & Gas Board); Briscoe v. Buzbee, 163 Miss. 574, 583, 143 So. 887, 887 (1932) (judicial notice of rules of Attorney General's Office).

Most federal courts take judicial notice of state executive and administrative orders,

in effect.[123] Legislative materials, such as journals, reports, and hearings, are also noticeable.[124] Private or special acts[125] and municipal ordinances,[126] on the other hand, are generally held not to be subject to judicial notice; they must be pleaded and proved.[127]

As implicitly recognized by the Advisory Committee that formulated rule 201, these rules of judicial notice of law are an unfortunate attempt to solve a procedural problem by a rule of evidence.[128] Laws are not facts—they are laws. When a court says municipal ordinances are not subject to judicial notice, it certainly does not mean that the judge cannot notice and apply an ordinance other than those proposed by the adversaries. Such a statement merely suggests that a judge cannot be expected to have access to all municipal ordinances and the burden of producing an accurate copy must be placed on the proponent.

C. *Procedural Solution*

Judicial notice of law was excluded from the rule's scope because "the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of proce-

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regulations, and the like. *See, e.g.*, Fano v. Meachum, 387 F. Supp. 664, 667 (D. Mass.) (judicial notice of state's prison regulations), *aff'd*, 520 F.2d 374 (1st Cir. 1975), *rev'd on other grounds*, 427 U.S. 215 (1976); Carter v. McGinnis, 320 F. Supp. 1092, 1094 (W.D.N.Y. 1970) (same); Long v. Avery, 251 F. Supp. 541, 557 (D. Kan. 1965) (judicial notice of state executive order). *But see* Campbell v. Mincey, 413 F. Supp. 16, 19 (N.D. Miss. 1975) (no judicial notice of regulations of Mississippi Commission on Hospital Care), *aff'd*, 542 F.2d 573 (5th Cir. 1976).

[123] *Compare* Brennan v. OSHA, 492 F.2d 1027, 1031 n.3 (2d Cir. 1974) (court would not take judicial notice of proposed OSHA rules) *with* Mississippi-Gulfport Compress & Warehouses, Inc. v. Public Serv. Comm'n, 189 Miss. 166, 177, 196 So. 793, 795 (1940) (judicial notice of official Secretary of State documents).

[124] *See, e.g.*, Long v. Docking, 283 F. Supp. 529, 543 (D. Kan. 1968) (per curiam) (judicial notice of legislative action); Ellis K. Oslowitz Co. v. United States, 200 F. Supp. 302, 306 (Cust. Ct. 1961) (judicial notice of legislative action and history); Witherspoon v. State, 138 Miss. 310, 320, 103 So. 134, 136-37 (1925) (en banc) (judicial notice of Senate Journal).

[125] *See* Campbell v. Mincey, 413 F. Supp. 16, 19 (N.D. Miss. 1975) (no judicial notice of rules of the Mississippi Commission on Hospital Care), *aff'd*, 542 F.2d 573 (5th Cir. 1976); Haas v. Hancock County, 183 Miss. 365, 374, 184 So. 812, 813 (1938) (court judicially noticed a statute authorizing Board of Supervisors to borrow money because the act was not private but was "local and public").

[126] *See, e.g.*, Dewell v. Lawson, 489 F.2d 877, 879 (10th Cir. 1974) (no judicial notice of municipal ordinances by court of general jurisdiction); White v. Thomason, 310 So. 2d 914, 917 (Miss. 1975); Stewart v. City of Pascagoula, 206 So. 2d 325, 327 (Miss. 1968). *But cf.* Bradford v. Peoples Natural Gas, Inc., 60 F.R.D. 432, 439 (W.D. Pa. 1973) (judicial notice that certain agencies were created by two municipalities).

[127] See note 109 and accompanying text *supra*.

[128] See note 112 and accompanying text *supra*.

dure."[129] Most trial judges cannot be expected to have the time and research facilities necessary to ascertain every law that may be relied upon in the courtroom. Consequently, the burden should be placed on the proponent to give notice of his intention to invoke a particular law. If the invocation is of a law of the United States, of a law of the state in which the court sits, or of any other law that can be readily ascertained, the proponent should not be required to produce a copy. However, if the cited law is not readily ascertainable, the proponent should be required to provide both the judge and the adversary with copies. The opponent could then challenge the copy if necessary.

As has been pointed out, however, the necessity of such a procedure and the present law regarding invocation of law should not be confused with the basic principle that a judge is free to notice sua sponte any law he deems applicable.[130] As stated by Professor Morgan, in the realm of judicial notice of law, as is also true with legislative facts, the "parties do no more than to assist, they control no part of the process."[131] In the courtroom a judge is master of the law and should be free to notice any law he wishes. However, a procedural rule that could be used to govern the input of law would serve as a valuable tool.

III. Conclusion

While Mississippi law would seem to allow a more invocable doctrine, the practitioner will probably find the doctrine more often used in federal trial courts than in those of Mississippi because of the lack of statutory and case law guidance in the state. The drafters of rule 201 of the Federal Rules of Evidence have traveled far towards making judicial notice a workable doctrine, and its use should increase in the federal courts because the rule settles many controversies[132] and provides procedural safeguards.[133]

An expanded use of the doctrine is desirable in terms of time, money, and general efficiency. Although judicial notice cannot replace formal evidence, the two can be used in harmony to produce a more logical system of adjudication by allocating undisputed propositions to judicial notice and disputed propositions to formal evidence.

Charles Edward Suffling

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[129] Fed. R. Evid. 201, Advisory Comm. Note.

[130] See notes 102 through 110 and accompanying text *supra.*

[131] Morgan, *supra* note 33, at 271.

[132] See notes 60 through 63 and accompanying text *supra.*

[133] See notes 63 through 81 and accompanying text *supra.*

RELEVANCY AND ITS LIMITS

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Although identifiable patterns can be found, most cases pertaining to relevancy defy categorization. Accordingly, the drafters of the Federal Rules of Evidence sought to provide for two types of situations with Article IV. General rules are provided for the multitude of unpredictable situations that will arise; specific rules are provided for those situations that reoccur with a significant degree of regularity. The purpose of this Article is to examine and analyze both the general and specific applications of relevancy contained in Article IV and the related Mississippi rules. A comparative approach is taken with the federal and Mississippi rules, an approach that should provide the attorney with a useful tool for both federal and state practice.

Rule 401. Definition of "Relevant Evidence"[1]

Compared with the many definitions of relevancy enunciated by different courts[2] and writers,[3] the one propounded by rule 401 is most succinct and liberal. The liberality can be attributed to the rule's use of the logical, rather than legal, relevancy standard. Evidence that would render a desired inference more probable than not is classified as

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[1] Fed. R. Evid. 401 provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See Evidence ⚿ 99, 114, 143-45.

[2] *See, e.g.*, State v. Wilson, 173 N.W.2d 563, 565 (Iowa 1970) ("Relevancy . . . means the logical relationship between proposed evidence and a fact to be established, the tendency to establish a material proposition."); Chase v. Beard, 55 Wash. 58, 346 P.2d 315, 317 (1959) (relevant evidence includes all facts supporting a reasonable inference); Zabner v. Howard Johnson's, Inc., 227 So. 2d 543, 545 (Fla. App. 1969) ("Relevancy describes evidence that has a legitimate tendency to prove or disprove a given proposition that is material as shown by the pleadings.").

[3] *See, e.g.*, C. McCormick, Handbook of the Law of Evidence § 185, at 434-35 (2d (E. Cleary) ed. 1972) ("Relevancy is the tendency of the evidence to establish a . . . proposition [in issue]."); James, *Relevancy, Probability and the Law*, 29 Cal. L. Rev. 689, 691, 704 (1941) (relevant evidence tends to prove "propositions of ultimate fact properly provable in a case under the pleadings and substantive law" or alters "the apparent probability of any material proposition in the case").

logically relevant.[4] Legal relevancy, on the other hand, applies to logically relevant evidence that has some "plus value,"[5] or some higher degree of probative value. Consequently, a closer nexus between the issue to be proved and the fact offered to prove it is required[6] to justify presentation of the evidence to the jury.[7]

While it is easy to define the difference between logical and legal relevancy, it is more difficult to apply the concepts in individual cases. One reason for this is the recognized principle that the determination of relevancy is within the discretion of trial judges, whose decisions will not be disturbed in the absence of abuse.[8] But, since rule 403 provides for exclusion of relevant evidence on certain grounds,[9] further distinctions between logical and legal relevancy are unnecessary for the scope of this Article.

Rule 401 contains three primary prerequisites for evidence to be relevant. First, the evidence offered must tend to prove a fact consequential to the determination of the action. This requirement explains the relationship between the proposition sought to be proved and the issues of the suit.[10] "The fact to be proved may be ultimate, intermediate, or evidentiary [and it] need not be in dispute."[11] Where intermedi-

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[4] Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 296 (1892) (the evidence "made it more probable [that the proposition was true] than if there had been no proof"); North Am. Phillips Co. v. Church, 375 F.2d 93, 96 (2d Cir. 1967); C. McCORMICK, *supra* note 3, § 185, at 437; James, *supra* note 3, at 699. *See generally* 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 30-35 (3d ed. 1940) (explaining the logical requirements of an inductive argument).

[5] 1 J. WIGMORE, *supra* note 4, § 28, at 409.

[6] Kassin v. United States, 87 F.2d 183, 184 (5th Cir. 1937); Torrey v. Congress Square Hotel Co., 145 Me. 234, 75 A.2d 451, 456 (1950). *See also* Cotton v. United States, 361 F.2d 673, 676 (8th Cir. 1966). McCormick defines legal relevancy as the process of excluding probative evidence which may cause prejudice, confusion, waste of time or surprise. C. McCORMICK, *supra* note 3, § 185, at 441. The drafters of the rules opted for handling such considerations apart from relevancy itself. *See* FED. R. EVID. 403 (excluding relevant evidence for prejudice, confusion, or delay).

[7] *See* 1 J. WIGMORE, *supra* note 4, § 28, at 409 ("[T]he Court will . . . allow to be considered only such evidence as is worth submitting to [the jury].").

[8] Hamling v. United States, 418 U.S. 87, 125-27 (1974); United States v. Carter, 522 F.2d 666, 685 (9th Cir. 1975); United States v. Hobson, 519 F.2d 765, 776 (9th Cir. 1975).

Inherent differences in judges and the peculiar circumstances of each case make it impossible to employ preexisting mechanical rules that will fit any situation. 1 WEINSTEIN'S EVIDENCE ¶ 401[01], at 401-06 (1975); *see* Montgomery v. National Convoy & Trucking Co., 186 S.C. 167, 195 S.E. 247, 253 (1938) (no definite fixed rule on admissibility). The tendency for judicial discretion to vary conforms to Thayer's belief that "[t]he law furnishes no test of relevancy." J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 265 (1898); *accord,* Occidental Life Ins. Co. v. Nichols, 266 Ala. 521, 97 So. 2d 879, 887 (1957); Hancock Truck Lines v. Butcher, 229 Ind. 36, 94 N.E.2d 537, 540 (1950); Glens Falls Ins. Co. v. Ogden, 310 S.W.2d 547, 549 (Ky. 1958).

[9] See notes 50 through 74 and accompanying text *infra.*

[10] FED. R. EVID. 401, Advisory Comm. Notes.

[11] *Id.*

ate or evidentiary facts are offered, the test is whether the evidence will aid in evaluating the probative value of any other evidence tending to prove an ultimate fact.[12] Examples of less than ultimate, yet still consequential, issues include credibility of witnesses, evaluation of evidential hypotheses, and evidence preliminary to impeachment.[13] The consequentiality concept was used in the rule because the materiality concept is "ambiguous and had been loosely applied."[14] Even though the new terminology may eventually meet the same fate, it at least affords a fresh start. The second requirement of rule 401 is that the proffered evidence must have some tendency to make the existence of the fact to be proved more probable or less probable. Despite the use of the term "any tendency," it is clear that admittedly relevant evidence may be excluded if it is too remote in time or place from the fact to be proved.[15] Remoteness, as with relevancy as a whole, is a matter within the discretion of the trial judge.[16] The final element required under rule 401 is probability.[17] A judge may thus look to whether the evidence "in some degree advances the inquiry"[18] or to its effect on the reasonable man.[19] The judge must also consider other factors; even if evidence meets the three relevancy criteria, it will be admitted only if it is not harmful to the jury under rule 403[20] or otherwise excluded by rule 402.[21]

Unlike the federal rules, Mississippi statutory law does not define relevancy. Of the few attempts to establish a common law definition, the most comprehensive is found in *Rayner v. Lindsey*,[22] in which the Mississippi Supreme Court stated:

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[12] 1 WEINSTEIN'S EVIDENCE ¶ 401[05], at 401-15 (1975).

[13] *Id.; see, e.g.,* United States v. Robinson, 530 F.2d 1076, 1079 (D.C. Cir. 1976) (admission of evidence which tended to discredit defendant without being dispositive of any ultimate issues); United States v. Stone, 471 F.2d 170, 172 (7th Cir. 1972) (same), *cert. denied,* 411 U.S. 931 (1973); United States v. Glaziou, 402 F.2d 8, 16 (2d Cir. 1968) (same). *See generally* C. MCCORMICK, *supra* note 3, § 29, at 59 (impeachment matters).

[14] FED. R. EVID. 401, Advisory Comm. Notes.

[15] 1 WEINSTEIN'S EVIDENCE ¶ 401[06], at 401-24 (1975); *see, e.g.,* Kaufman v. United States, 268 F. Supp. 484, 489 (E.D. Mo. 1967) (testimony of psychiatrist who examined habeas petitioner four years prior to trial held too remote), *rev'd on other grounds,* 394 U.S. 217 (1968).

[16] "[E]vents which occur prior to the commission of a crime are often relevant to an understanding of the nature of the crime itself. 'How far back . . . one may go is a matter of degree, and within the general control of the judge over the relevancy of evidence.' " United States v. Hickey, 360 F.2d 127, 140 (7th Cir. 1966) (quoting United States v. Dennis, 183 F.2d 201, 231 (2d Cir. 1950), *aff'd,* 341 U.S. 494 (1957)).

[17] 1 WEINSTEIN'S EVIDENCE ¶ 401[07], at 401-25 (1975).

[18] C. MCCORMICK, *supra* note 3, § 185, at 438.

[19] 1 WEINSTEIN'S EVIDENCE ¶ 401[07], at 401-25 (1975).

[20] See notes 59 through 70 and accompanying text *infra.*

[21] See notes 42 through 47 and accompanying text *infra.*

[22] 243 Miss. 824, 138 So. 2d 902 (1962).

> Generally, it may be said that any legally competent evidence which, when taken alone or in connection with other evidence, affords reasonable inferences upon the matter in issue, tends to prove or disprove a material or controlling issue or to defeat the rights asserted by one or the other of the parties, and sheds any light upon or touches the issues in such a way as to enable the jury to draw a logical inference with respect to the principal fact in issue is relevant and admissible.[23]

The court held that the rules of evidence require the admission "of all facts and circumstances which are relevant . . . and are not inadmissible because of some exclusionary rule of evidence."[24] The definition adopted in *Rayner* places Mississippi among the jurisdictions following the concept of logical relevancy.[25] As does the federal rule, Mississippi vests the determination of whether proffered evidence is relevant in the discretion of trial judges, whose decisions will not be reversed in the absence of clear abuse.[26]

The Mississippi cases construing relevancy use the terms "material or controlling issue" and "principal fact" rather than "consequential fact," though there is no major difference between the Mississippi Supreme Court's interpretation and the view taken by the Advisory Committee. For example, in *American Potash & Chemical Corp. v. Nevins*[27] the court held that evidence is admissible to show a collateral fact so long as it tends to prove or disprove a fact that has been put at issue in the case.[28] Furthermore, this fact may be intermediate rather than ultimate.[29] Similarly, evidence that will assist in evaluating the probative value of other evidence tending to prove a material fact is also admissible in Mississippi,[30] as is evidence introduced for the purpose of im-

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[23] *Id.* at 837, 138 So. 2d at 907-08.

[24] *Id.*

[25] *See id.* (relevant evidence results from a "logical inference"); Self v. State, 178 Miss. 560, 567, 174 So. 44, 46 (1937) ("All facts which . . . sustain or . . . impeach a logically pertinent hypothesis are admissible."); Clark v. State, 123 Miss. 147, 157, 85 So. 188, 190 (1920) (because there is no precise test, "relevancy is to be determined by logic").

[26] McNeil v. State, 308 So. 2d 236, 241-42 (Miss. 1975); Wilkins v. State, 264 So. 2d 411, 413-14 (Miss. 1972); Stewart v. State, 226 So. 2d 911, 912 (Miss. 1969).

[27] 249 Miss. 450, 163 So. 2d 224 (1964).

[28] *Id.* at 458, 163 So. 2d at 227.

[29] *See* Travelers Indem. Co. v. Davis Wholesale Drug Co., 234 So. 2d 604, 605 (Miss. 1970) (inventory computations admissible as a predicate for establishing value of stolen property); Williams v. Newberry, 32 Miss. 256, 259 (1856) (admissible evidence may be "incomplete, or insufficient by itself" to establish a material fact as long as it tends to prove same).

The test is more rigid in criminal cases. *See* Raines v. State, 81 Miss. 489, 497, 33 So. 19, 20 (1902) ("It is a general rule . . . that the evidence must be confined to the point in issue, and that in criminal cases, especially, the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment.").

[30] *See* Rosser v. State, 230 Miss. 573, 577, 93 So. 2d 470, 471 (1957) (evidence of

peaching the credibility of a witness.[31] In contrast, evidence so far removed in time or place that it denies any tendency to make the existence of the fact to be proved more or less probable may be excluded.[32] Rule 401's requirement that an intended inference be probable is also entrenched in Mississippi. In *Masonite Corp. v. Hill*,[33] Justice Griffith said, "[W]e shall allow in this jurisdiction the establishment of a case by inference upon inference so long as the ultimate inference . . . is, without too much doubt, a safe and dependable probability . . . ."[34]

One area of disagreement in federal and state practice is the admissibility of lie detector test results. While the Mississippi Supreme Court has firmly rejected contentions that the results should be admitted as probative,[35] the federal courts have begun to relax the rule and accept such evidence.[36] Other than this one distinction, however, both court systems employ substantially the same definition of relevancy and require the admission "of all facts and circumstances that are relevant" and not otherwise inadmissible.[37]

Finally, any consideration of relevancy must be supplemented by an analysis of matters specifically addressed in other rules. The concept of res gestae is used by both federal and state courts to admit, as exceptions to the hearsay rule, oral and written utterances that were a part of the transaction at issue.[38] Furthermore, this principle sometimes

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defendant's good character admissible since related to intent, an element of the crime); Downs v. State, 74 Miss. 777, 781, 21 So. 657, 658 (1897) (same).

[31] Sartain v. State, 311 So. 2d 343, 345 (Miss. 1975).

[32] Wilkins v. State, 264 So. 2d 411 (Miss. 1972); Stewart v. State, 226 So. 2d 711 (Miss. 1969); *see* Barrett v. Shirley, 231 Miss. 364, 373, 95 So. 2d 471, 474 (1957) (speed of passing car a remote issue when seen four minutes before accident). *But see* Ideal Cement Co. v. Killingsworth, 198 So. 2d 248, 250-51 (Miss. 1967) (speed of car one-fourth mile before accident admitted); Baxter v. Rounsaville, 193 So. 2d 735, 738 (Miss. 1967) (same); Bennett v. Hardwell, 214 Miss. 390, 395, 59 So. 2d 82, 83 (1952) (speed of auto five miles and four minutes from accident not remote when car remained in sight).

[33] 170 Miss. 158, 154 So. 295 (1934).

[34] *Id.* at 168, 154 So. at 298; *accord,* Goodyear Tire & Rubber Co. v. Brashier, 298 So. 2d 685 (Miss. 1974); Holcomb v. Singing River Elec. Power Ass'n, 231 So. 2d 192 (Miss. 1970); *cf.* Tombigbee Elec. Power Ass'n. v. Gandy, 216 Miss. 444, 452, 62 So. 2d 567, 569 (1953) (improper to pyramid inferences beyond legitimate conclusion).

[35] Harrison v. State, 307 So. 2d 557, 562 (Miss. 1975).

[36] *See* United States v. Oliver, 525 F.2d 731, 736-37 (8th Cir. 1975) (discussion of whether polygraph examinations have become sufficiently reliable to permit admissibility) (citing United States v. Wainwright, 413 F.2d 796, 803 (10th Cir. 1969)), *cert. denied,* 396 U.S. 1009 (1970).

[37] Rayner v. Lindsey, 243 Miss. 824, 837, 138 So. 2d 902, 907-08 (1962).

[38] *Compare* Simon v. Dixie Greyhound Lines, 179 Miss. 568, 578, 176 So. 160, 162 (1939) (oral statements of deceased after accident inadmissible under res gestae because statements merely constituted history of completed past affair) *with* FED. R. EVID. 801 (hearsay statements include nonverbal conduct intended as an assertion).

serves to support the introduction of noncommunicative evidence.[39] Admission of such evidence is, however, actually justified on the ground that the statement or noncommunicative evidence involved is particularly relevant. Second, while the concepts of "habit" and "custom" are expressly treated by the federal rules,[40] Mississippi uses the term "similar occurrences or transactions," which is actually broader in scope.[41] The contrasting standards again allow admissibility because such items are particularly relevant.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE[42]

The principle that all relevant evidence is admissible is subject to various exceptions based on grounds of law or policy.[43] Rule 402 addresses those exceptions based on law, which flow from the Constitu-

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[39] *E.g.*, Byrd v. State, 179 Miss. 336, 341, 175 So. 190, 192-93 (1937) (testimony that defendant shot his father immediately before killing deceased was a relevant part of the continuing transaction and properly admitted); Tucker v. Gulley, 176 Miss. 708, 723, 170 So. 230, 233 (1936) (testimony that police handcuffed defendant after apparent shooting properly admitted under res gestae); McCormick v. State, 159 Miss. 610, 613, 132 So. 757, 757 (1931) (events prior to killing admitted); *cf.* Starks v. State, 245 Miss. 238, 242, 147 So. 2d 503, 505 (1962) (application of res gestae left to discretion of trial judge). *See also* St. Louis-San Fran. Ry. v. Thompson, 30 F.2d 586, 587 (5th Cir. 1929) (evidence of defective railroad crossing admitted).

[40] FED. R. EVID. 406.

[41] Johnson v. Consolidated Am. Ins. Co., 244 So. 2d 400, 403 (Miss. 1971); Owen v. Sumrall, 204 Miss. 15, 30, 36 So. 2d 800, 803 (1948). Mississippi has also allowed evidence of habit and custom evident in the profession or industry, not just the similar acts of the parties involved in the suit. Although this evidence is relevant and often probative of what the parties may have intended, it should not be confused with rule 406. *See, e.g.*, Jenkins v. Young, 319 So. 2d 228, 229 (Miss. 1975) (admission of comparable market value of similar stocks subject to judicial discretion); Pearl River Valley Water Supply Dist. v. Wright, 203 So. 2d 69, 72 (Miss. 1967) (similar sales of land in the local neighborhood admissible at judge's discretion); Simmons v. Bainter, 155 Miss. 804, 809-10, 125 So. 338, 339 (1929) (current price levels of items allegedly purchased under contract); Lizana v. Edward Motor Sales Co., 163 Miss. 266, 270-71, 141 So. 295, 296 (1932) (testimony concerning defendant's practice of setting back speedometers before selling cars relevant to show fraud).

> It is not essential to the competency of such evidence that it should relate to transactions contemporaneous with the one investigated. If they are so closely related in time that the intent that governed in the one may . . . be inferred to be the intent that controlled the other, then the one sheds light upon the other.

Bernheim v. Dibrell, 66 Miss. 199, 203-04, 5 So. 693, 694 (1889).

[42] FED. R. EVID. 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." See Criminal Law ⚿ 674; Evidence ⚿ 114-16, 382; Federal Civil Procedure ⚿ 2011.

[43] J. THAYER, *supra* note 8, at 530.

tion,[44] acts of Congress,[45] the Federal Rules of Civil and Criminal Procedure,[46] court rules adopted by the Supreme Court and district courts, and other provisions of the Federal Rules of Evidence.[47] Consequently, relevant evidence may be ruled inadmissible because of the various exclusionary provisions found outside Article IV.

While it is unlikely that Mississippi statutes and court rules will ever affect the use of otherwise relevant evidence to the extent acts of Congress and rules adopted by the United States Supreme Court affect federal relevance, Mississippi's exclusionary scheme is almost the same as that of rule 402. Accordingly, relevant evidence will be excluded by Mississippi courts if admission would violate the federal or state constitutions,[48] or any statutes containing exclusionary provisions.[49]

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[44] 1 WEINSTEIN'S EVIDENCE ¶ 402[03], at 402-11 (1975). While the rule recognizes constitutional considerations, it makes no attempt to delineate the constitutional requirements for the admissibility of evidence. FED. R. EVID. 402, Advisory Comm. Notes. The cases, however, have revealed examples of such constitutionally tainted evidence. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (fourth amendment protection extended to areas where there is a subjective expectation of privacy); United States v. Wade, 388 U.S. 218, 239-43 (1967) (postindictment lineup identification excluded where defendant not informed of right to counsel); Miranda v. Arizona, 384 U.S. 436, 474 (1966) (evidence excluded where warnings against self-incrimination not given); Massiah v. United States, 377 U.S. 201, 201-06 (1964) (inducement of incriminating statement in violation of right to counsel). In some instances these constitutional provisions have been strengthened by congressional acts. *See* Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §§ 2510-2520 (1970).

[45] *See, e.g.*, 8 U.S.C. § 1202(f) (1970) (confidentiality of records of refusals of visas or permits to enter the United States); 13 U.S.C. § 9(a) (1970) (confidentiality of census information). *See generally* FED. R. EVID. 402, Advisory Comm. Notes. The exclusion of evidence prohibited by a federal act does not prevent the possibility of conflict where a statute provides for the admission of evidence which the rules exclude. However, there should be no such problem where the statute excludes evidence admissible under the rules. *See* 1 WEINSTEIN'S EVIDENCE ¶ 402[04], at 402-13 (1975).

[46] *See, e.g.*, FED. R. CIV. P. 30(b), 32(a)(3) (impositions on the use of relevant depositions); FED. R. CRIM. P. 15 (same). *See generally* FED. R. CIV. P. 26-37 (limitations on the use of evidence obtained pursuant to discovery procedures); FED. R. EVID. 402, Advisory Comm. Notes. *See also* FED. R. CRIM. P. 26 (taking of testimony).

[47] *E.g.*, FED. R. EVID. art. V. (privileges); *id.* art. VI (limitations on witnesses); *id.* art. X (contents of writings, recordings, and photographs).

[48] *See, e.g.*, Lacaze v. State, 254 Miss. 523, 531, 183 So. 2d 176, 180 (1966) (fruits of unreasonable search and seizure prohibited); Adams v. State, 202 Miss. 68, 76, 30 So. 2d 593, 597-98 (1947) (illegal search); Elardo v. State, 164 Miss. 628, 633, 145 So. 615, 616 (1933) (search based on less than probable cause).

[49] *E.g.*, MISS. CODE ANN. § 13-1-7 (1972) (dead man's statute); *id.* § 13-1-13 (self incrimination); *id.* §§ 13-1-21, -22 (privileged communications); *id.* §§ 13-1-232, -233 (use of depositions and answers to interrogatories under discovery statutes).

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME[50]

The second rule of general exclusion, rule 403, deals with certain policy factors that reduce the probative value of evidence to such a degree as to make its admissibility undesirable.[51] The question of what policy factors should be included in rule 403 was the subject of at least two primary differences of opinion. The first area of disagreement was whether the rule should be divided into mandatory and discretionary sections. The original draft of the rule followed this bifurcated approach, and judicial discretion was not allowed where the probative value of evidence was "outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[52] Exclusion was left solely with the judge where delay, waste of time, and cumulative evidence were involved.[53] Because of stiff opposition to the two-part rule,[54] however, the totally discretionary version was adopted. The second controversy arose over surprise as a ground for exclusion.[55] It was ultimately rejected by the Advisory Committee because discovery and pretrial procedures have largely eliminated the danger of unfair surprise.[56] Furthermore, surprise is often useful in determining the truth.[57] Rule 403, then, provides only general grounds for exclusion and for the most part leaves the question to the discretion of the trial court.[58]

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[50] FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See Criminal Law ⇦674-75; Evidence ⇦ 188-94, 359, 382.

[51] C. MCCORMICK, *supra* note 3, § 185, at 434-41.

[52] FED. R. EVID. 403.

[53] 1 WEINSTEIN'S EVIDENCE ¶ 403[01], at 403-5 (1975).

[54] *See* Report of American College of Trial Lawyers 15 (April, 1970) ("a verbal formula for a precise rule such as is attempted in paragraph (a), with its expression 'substantially outweighed', is unattainable"); Department of Justice Report 9 (1971) (opposing the absolute standard of inadmissibility); C. MCCORMICK, *supra* note 3, § 152, at 320 (1954).

[55] Exclusion because of surprise has gained increasing acceptance. *E.g.*, KAN. STAT. § 60-445 (1964); Model Code of Evidence 303(1)(c) (1942).

[56] FED. R. EVID. 403, Advisory Comm. Notes.

[57] 1 WEINSTEIN'S EVIDENCE ¶ 403[01], at 403-10 (1975). One solution to the problem of surprise is a continuance to investigate the new facts rather than exclude them. *E.g.*, Clark v. Pennsylvania R.R., 328 F.2d 591, 593-95 (2d Cir. 1964). Even so, the element of surprise can still be influential. *See* United States v. Carter, 522 F.2d 666, 685-86 (9th Cir. 1975) (exhibits introduced after defense had closed, offered little opportunity for rebuttal).

[58] United States v. Medico, 557 F.2d 309, 317-18 (2d Cir. 1977); United States v. Robinson, 530 F.2d 1076, 1081 (D.C. Cir. 1976); United States v. Baller, 519 F.2d 463, 465 (4th Cir.), *cert. denied*, 423 U.S. 1069 (1975); United States v. Jackson, 405 F. Supp. 938, 944-45 (E.D.N.Y. 1975). It has been suggested that the trial judge use discretion sparingly. 1 WEINSTEIN'S EVIDENCE ¶ 403[01], at 403-7, ¶ 403[02], at 403-14 to -15 (1975).

The first policy exclusion with which rule 403 deals is unfair prejudice. While rules 407 through 410 are to an extent based on the premise that certain evidence is inherently prejudicial and as such must be considered inadmissible,[59] rule 403 is directed at evidence that appeals to the jury's emotions of sympathy,[60] horror,[61] or its instinct to punish.[62] Such evidence, if likely to cause the jury to base its decision on something extraneous to the issues, should be excluded.[63] The courts, however, have been somewhat reluctant to invoke the ground of prejudice to exclude otherwise relevant evidence.[64]

Even though evidence is relevant to collateral or subordinate issues, it should be rejected if it might confuse or mislead the jury.[65] If such

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[59] 1 WEINSTEIN'S EVIDENCE ¶ 403[03], at 403-17 (1975).

[60] *See, e.g.*, Troper v. Shell Oil Co., 307 F.2d 757, 769 (2d Cir. 1962) (reference to plaintiff's dependent children relevant to plaintiff's state of mind).

[61] *See, e.g.*, Rivers v. United States, 270 F.2d 435, 437-38 (9th Cir. 1959) (photographs of deceased homicide victim), *cert. denied*, 362 U.S. 920 (1960); United States v. 88 Cases, 187 F.2d 967, 975 (3d Cir. 1951) (photographs of soft drink's effect on guinea pigs), *cert. denied*, 342 U.S. 861 (1951).

[62] *See generally* Coleman Motor Co. v. Chrysler Corp., 528 F.2d 1338, 1350-51 (3d Cir. 1975) (reference to prior manslaughter verdict against defendant was prejudicial); United States v. Bridgeman, 523 F.2d 1099, 1117 (D.C. Cir. 1975) (evidence of homosexual rape admissible since relevant to show element of bodily harm under riot statute); United States v. Jackson, 405 F. Supp. 938, 945 (E.D.N.Y. 1975) (evidence of unrelated arrest inadmissible where stipulation to certain probative facts gathered from the arrest).

[63] Apicella v. McNeil Laboratories, 66 F.R.D. 78, 86 (E.D.N.Y. 1975) (1974 medical newsletter remote as to 1972 negligent act); Vockie v. General Motors Corp., 66 F.R.D. 57, 60 (E.D. Pa.) (proferred testimony's potential for confusion and prejudice outweighed any possible probative value), *aff'd*, 523 F.2d 1052 (3d Cir. 1975); United States v. DeMarco, 407 F. Supp. 107, 114 (C.D. Cal. 1975) (description of interview containing equivocal statements refused since "nothing could be more likely to distract the jury").

[64] *See* United States v. Robinson, 530 F.2d 1076, 1081 (D.C. Cir. 1976) (extrinsic evidence of witness' "prior bad acts" admitted as probative of bias); United States v. Epperson, 528 F.2d 48, 50 (9th Cir. 1975) (FBI agent's testimony concerning previous robbery admitted); United States v. Bridgeman, 523 F.2d 1099, 1117 (D.C. Cir. 1975) (evidence of thirty homosexual assaults during prison riot admitted as proof of essential element of offense); United States v. Baller, 519 F.2d 463, 466 (4th Cir.) (voiceprints admitted with admonition that jury could disregard the expert's testimony if they thought it unreliable), *cert. denied*, 423 U.S. 1019 (1975); United States v. Tramunti, 513 F.2d 1087, 1105 (2d Cir.) (testimony about unusually large amount of cash on person of defendant in narcotics case admitted), *cert. denied*, 423 U.S. 823 (1975); United States v. Leaphont, 513 F.2d 747, 748 (10th Cir. 1975) (admission in narcotics case of nonprohibited common dilutants of heroin found on defendant's person); United States v. Franks, 511 F.2d 25, 33 (6th Cir. 1975) (expert voiceprint testimony properly admitted where defendant failed to introduce evidence of inaccuracy), *cert. denied*, 422 U.S. 1042 (1975); United States v. Clark, 398 F. Supp. 341, 365 (E.D. Pa. 1975) (postarrest photos of defendant admissible where cropped to remove prejudicial markings), *aff'd*, 532 F.2d 745 (3d Cir. 1976).

[65] "Confusion of issues" and "misleading the jury" are closely related and the terms are often used interchangeably. Misleading or confusion may arise from incorporation of

evidence were admitted, a jury might allow its resolution of collateral matters to affect the primary decision.[66] For this reason, rule 403 provides that confusing and misleading evidence may be excluded.[67] Furthermore, evidence that has the capability of being considered infallible is often excluded because it is likely to confuse or mislead.[68] But the question of exclusion is discretionary,[69] and evidence that may confuse or distract the jury is often admitted where the probative value is sufficiently high.[70]

Unduly lengthy and cumulative evidence provide the final reasons for exclusion of evidence under rule 403. It would be difficult for any judge to conduct an efficient trial if he lacked the authority to limit the introduction of such evidence. If evidence is so overwhelming in quantity as to make impossible a timely consideration by the court,[71] or if it is offered so late that the opponent's attempts to reply will unduly prolong the trial,[72] the court may exclude it. Likewise, evidence that will add nothing new to the record may be rejected,[73] as may cumulative evidence, which has been otherwise already established.[74] Since most

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previous litigation or introduction of evidence with "an aura of scientific infallibility." 1 WEINSTEIN'S EVIDENCE ¶ 403[04] (1975). Confusion is also possible with posed photographs. *Id.* ¶ 403[05], at 403-33 (citing Hopper v. Reed, 320 F.2d 433, 434-35 (6th Cir. 1963)).

[66] *See* C. MCCORMICK, *supra* note 3, § 185, at 439.

[67] This aspect of rule 403 has received considerable support from the cases. United States v. Johnson, 558 F.2d 744, 746 (5th Cir. 1977); United States v. Pollock, 394 F.2d 922, 925 (7th Cir.), *cert. denied,* 393 U.S. 924 (1968); United States v. DeMarco, 407 F. Supp. 107, 114 (C.D. Cal. 1975); Vockie v. General Motors Corp., 66 F.R.D. 57, 60 (E.D. Pa.), *aff'd,* 523 F.2d 1052 (3d Cir. 1975); Apicella v. McNeil Laboratories, 66 F.R.D. 78, 86 (E.D.N.Y. 1975); Seven Provinces Ins. Co. v. Commerce & Indus. Ins. Co., 65 F.R.D. 674, 689 (W.D. Mo. 1975).

[68] Lindsey v. United States, 237 F.2d 893, 897 (4th Cir. 1956) (sodium pentathol truth test); United States v. Ridling, 350 F. Supp. 90, 96 (E.D. Mich. 1972) (polygraph test).

[69] United States v. Ravich, 421 F.2d 1196, 1204-05 (2d Cir.), *cert. denied,* 400 U.S. 834 (1970); United States v. Grayson, 166 F.2d 863, 867 (2d Cir. 1948).

[70] *Cf.* United States v. Bowe, 360 F.2d 1, 16 (2d Cir.) (where confusion outweighs probative value, evidence will not be admitted), *cert. denied,* 385 U.S. 961 (1966).

[71] *See* United States v. United Shoe Mach. Corp., 93 F. Supp. 190, 191 (D. Mass. 1950) (counsel required to select relevant portions of undigested mass of documents obtained through extensive discovery for the court's attention).

[72] Sternberg Dredging Co. v. Moran Towing & Transp. Co., 196 F.2d 1002, 1004 (2d Cir. 1952).

[73] A prime example of this problem is where there is an offer of proof of similar accidents at the place in question. This type of evidence is usually accepted unless the opponent insists on detailing the facts and circumstances of each accident, in which event the loss of time would probably outweigh probative value. *See* 19 ALI PROCEEDINGS 223 (1942).

[74] State Farm Mut. Ins. Co. v. Jackson, 346 F.2d 484, 491-92 (8th Cir. 1965); United States v. Kalmutz, 309 F.2d 437, 439-40 (5th Cir. 1962); *see* Vockie v. General Motors

cases in federal courts are now preceded by extensive discovery and pretrial procedures, however, courts are able to reduce delays and require the employment of timesaving devices prior to trial.

The Mississippi treatment of these exclusionary grounds closely parallels that of rule 403. For example, injection of testimony tending to engender racial prejudice is reversible error,[75] since such evidence is irrelevant and "has no place in the administration of justice."[76] Mention of a weapon found on or about one's person, if not directly related or material to the offense charged, is also prohibited,[77] as is the introduction of evidence that tends to show the guilt of one by the acts of another.[77.1] In addition, evidence of a witness' extrajudicial identification of an accused frequently involves a question of prejudice and is prohibited.[78] Thus, any evidence that unnecessarily arouses the emotions of the jury is likely to be excluded in state court[79] as it would be in federal court. While a single item of blatantly prejudicial testimony may warrant a new trial,[80] the combined result of multiple instances of less prejudicial testimony may also destroy the fairness of a proceeding.[81] However, if otherwise prejudicial testimony serves to prove or disprove facts material to the issues in question,[82] or necessary to the prosecution of a case,[83] such testimony may be allowed.

The Mississippi Supreme Court further prohibits injection of collateral or secondary issues that divert the attention of the jury from the primary questions being litigated.[84] For example, in *Coleman v. State*[85]

Corp., 66 F.R.D. 57, 63 (E.D. Pa.) (federal agency report inadmissible cumulative evidence of similar occurrences), *aff'd,* 523 F.2d 1052 (3d Cir. 1975). Besides being a waste of the court's time, cumulative evidence is often misleading. Hamling v. United States, 418 U.S. 87, 127 (1974).

[75] Gaston v. State, 239 Miss. 420, 424, 123 So. 2d 546, 548 (1960).

[76] *Id.* at 424, 123 So. 2d at 548.

[77] *Id.* at 425, 123 So. 2d at 549.

[77.1] *See* Craft v. State, 254 Miss. 413, 421, 181 So. 2d 140, 143 (1965) (codefendant's suicide).

[78] Simes v. State, 250 So. 2d 705, 707 (Miss. 1971); Butler v. State, 217 So. 2d 316 (Miss. 1968); *cf.* Allen v. State, 274 So. 2d 136, 137-38 (Miss. 1973) (only postindictment lineups prejudicial).

[79] *See* Herman v. State, 75 Miss. 340, 345, 22 So. 873, 873 (1898) (prohibition against prior offenses since evidence of separate and distinct offenses confuses and misleads the jury).

[80] *See* Gaston v. State, 239 Miss. 420, 424, 123 So. 2d 546, 548 (1960) (reversible error to admit testimony that suspect was black).

[81] Sumrall v. State, 272 So. 2d 917, 919 (Miss. 1973).

[82] *See* Vicksburg & J.R.R. v. Patton, 31 Miss. 156, 194 (1856) (bad character and unfitness of a corporate employee allowed even though prejudicial to the corporation).

[83] *See* Lay v. State, 310 So. 2d 908, 912 (Miss. 1975) (arrest records allowed to prove identification of accused by his recorded fingerprints).

[84] May v. State, 199 So. 2d 635, 641 (Miss. 1967).

[85] 198 Miss. 519, 23 So. 2d 404 (1945).

the prosecution attempted to establish motive for arson by evidence of the defendant's intimate relations with a man who was with another woman inside the building allegedly set ablaze by the defendant. Having established a motive, the prosecutor continued to probe the illicit relationship by detailed questioning of both the defendant and her paramour. Reversing the conviction, Justice Griffith noted that the introduction of such collateral and inflammatory testimony made it difficult for the jury to determine whether the defendant had been indicted for arson or unlawful cohabitation[86] and pointed out that "incompetent evidence . . . of an inflammatory character, is presumed to have been harmful, and it is only when we can say with confidence that it had, in all probability or likelihood, no such effect that we may decline to reverse on account of it."[87] Consistent with prior policy statements by the court,[88] the *Coleman* rule has equal application to evidence that could mislead a jury.[89]

The court has also stated that the "order of judicial investigation, including the time and manner of introducing evidence, is, and of necessity must be, committed to the sound discretion of the trial judge."[90] Consequently, no absolute rule can be contrived to govern exclusion of evidence that tends to impede the orderly, timely flow of a judicial proceeding. It is clear, however, that the court, in seeking judicial economy, does not approve the use of disproportionately lengthy rebuttal testimony,[91] or the use of voluminous and unorganized business records.[92] Cumulative testimony is similarly to be eschewed,[93] though de-

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[86] *Id.* at 522, 23 So. 2d at 405.

[87] *Id. See also* Pendergraft v. State, 191 So. 2d 830, 837 (Miss. 1966) (prejudicial to admit revoked will to establish motive for testator's murder, but probated will admissible).

[88] *See* Lowenstein v. Aaron, 69 Miss. 341, 346, 12 So. 269, 269 (1891) (commercial rating of attached debtor, absent evidence showing its relevance, was wholly inconclusive and potentially misleading).

[89] See note 65 *supra.*

[90] Flynn v. Kurn, 183 Miss. 413, 427, 184 So. 160, 164 (1938); Winterton v. Illinois Cent. R.R., 73 Miss. 831, 836, 20 So. 157, 158 (1896).

[91] Roney v. State, 167 Miss. 827, 831-32, 150 So. 774, 775-76 (1933).

> [W]hen the question is not free from doubt whether the evidence offered in rebuttal is that which belongs to the evidence in chief, or whether it is rebuttal evidence proper, the court should resolve the doubt in favor of the reception in rebuttal where . . . its reception will not consume so much additional time as to give an undue weight in practical probative force to the evidence so received in rebuttal . . . .

Id.; accord, St. Louis-San Fran. Ry. v. Dyson, 207 Miss. 639, 655-56, 43 So. 2d 95, 98-99 (1950).

[92] Crawford v. State, 162 Miss. 158, 163, 138 So. 589, 590 (1932).

[93] *See* New Orleans & N.E.R.R. v. Shows, 240 Miss. 604, 608, 128 So. 2d 381, 382 (1961) (unnecessary to admit physician's testimony that deceased was found to be deaf

termination of what constitutes cumulative evidence is often difficult.[94] The scheme that ultimately emerges from state practice reveals no conceptual distinction from rule 403,[95] and federal and state cases may be used interchangeably in most instances.

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes[96]

Because of its potentially prejudicial nature, evidence of a person's character or specific trait is generally inadmissible to prove that his actions conformed to that character or trait.[97] Moreover, the introduction of such evidence, when permitted, is carefully limited to the specific exceptions provided in rule 404.[98] The exclusionary force of the rule is,

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twelve years earlier following evidence showing acute hearing difficulty); Ward v. State, 203 Miss. 876, 880, 34 So. 2d 720, 722 (1948) (in trial for murder of taxi driver, cumulative to admit evidence that defendant was seen with another passenger earlier on night of killing).

[94] *See* Barham v. Nowell, 243 Miss. 441, 450, 138 So. 2d 493, 496 (1962) (introduction of films to support prior oral testimony not cumulative since films were more accurate).

[95] Mississippi also follows the federal and common law rule that "surprise" is not a legitimate relevancy objection. *See* Ennis v. Yazoo & M.V.R.R., 118 Miss. 509, 515, 79 So. 73, 75 (1918) (surprise not a sufficient ground for new trial); Curry, Dimukes & Co. v. Kurtz, 33 Miss. 24, 32-33 (1857) (same). *See generally* 1 Weinstein's Evidence ¶ 403[01], at 403-9 to -11 (1975).

[96] Fed. R. Evid. 404 provides:

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
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> (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
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> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

See Criminal Law ⚿ 369-74; Evidence ⚿ 106. *Compare* rules 404 and 405 *with* rule 608 (discussed in Gunn, *Witnesses*, 48 Miss. L.J. 1059 (1977)).

[97] Michelson v. United States, 335 U.S. 469, 475-76 (1948); United States v. Calvert, 523 F.2d 895, 907 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); United States v. Crockett, 514 F.2d 64, 71 (5th Cir. 1975); Manning v. Rose, 507 F.2d 889, 892-95 (6th Cir. 1974).

[98] United States v. Bledsoe, 531 F.2d 888, 890-91 (8th Cir. 1976). Fed. R. Evid. 404 is the basic rule dealing with character evidence and applies equally to civil and criminal

however, inapplicable when a person's particular character trait is a material or consequential element of the case,[99] since it is a component of the crime or defense and not offered to prove a defendant's propensity to commit a particular act.[100]

One of the bases of rule 404 is the principle firmly entrenched in the Anglo-American criminal law concept that an accused cannot be forced to testify against himself.[101] Indeed, all American jurisdictions have adopted the position that character evidence offered solely to show the accused's propensity to commit the offense charged is inadmissible.[102] This rule is based primarily on the belief that evidence of prior offenses could cause the jury to punish the accused for offenses other than those charged, creating a tendency to convict on insufficient evidence.[103]

Under rule 404(a)(1), an accused may introduce evidence of his own character, but in so doing he opens the door for the introduction of additional evidence in the prosecution's rebuttal.[104] Similarly, if the defendant takes the stand himself, his credibility may be impeached.[105] A special situation exists when a defendant raises the entrapment defense. Since character and prior conduct are placed in question to determine the existence of any predisposition to commit a crime, evidence

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cases. 2 WEINSTEIN'S EVIDENCE ¶ 404[03], at 404-18 to -19 (1976). Character evidence has traditionally been excluded for lack of probative value and fear of prejudice or confusion. 1 J. WIGMORE, *supra* note 4, § 64, at 472-73. *See also* FED. R. EVID. 405 (how character evidence is proved), discussed in notes 201 through 207 and accompanying text *infra*.

[99] United States v. Fairchild, 526 F.2d 185, 188-89 (7th Cir. 1975), *cert. denied*, 425 U.S. 924 (1976); United States v. Crockett, 514 F.2d 64, 72 (5th Cir. 1975); Perkins v. United Transp. Co., 219 F.2d 422, 423 (2d Cir. 1955); United States v. Ridling, 350 F. Supp. 90, 92 (E.D. Mich. 1972). Where evidence would constitute harassment and would have little bearing on the issues, it should be excluded under rule 403. *See* St. Clair v. Eastern Air Lines, Inc., 279 F.2d 119, 121 (2d Cir. 1960) (personal lifestyle of decedent inadmissible to show his business abilities in wrongful death action).

[100] United States v. DeVincent, 546 F.2d 452 (1st Cir. 1976); *see* FED. R. EVID. 404(a), Advisory Comm. Note (giving as examples chastity of victim under statute specifying chastity as element of crime of seduction and competency of driver in action for negligently entrusting motor vehicle to incompetent driver).

[101] 2 WEINSTEIN'S EVIDENCE ¶ 404[04], at 404-23 (1976).

[102] United States v. Cohen, 544 F.2d 781, 785 (5th Cir. 1977); 2 WEINSTEIN'S EVIDENCE ¶ 404[04], at 404-23 (1976); 1 J. WIGMORE, *supra* note 4, § 57, at 456.

[103] Michelson v. United States, 335 U.S. 469, 476 (1948); Note, *Procedural Protections of the Criminal Defendant—A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 436 (1964).

[104] United States v. Bledsoe, 531 F.2d 888, 892 (8th Cir. 1976); United States v. Bermudez, 526 F.2d 89, 95 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976).

[105] United States v. Perry, 512 F.2d 805, 806-07 (6th Cir. 1975); United States v. Walker, 313 F.2d 236, 239 (6th Cir.), *cert. denied*, 374 U.S. 807 (1963). *See generally* FED. R. EVID. 608, 609 (governing the use of character evidence to impeach).

of character and prior conduct can be introduced by the prosecution. Inquiry can even be made about activities for which the defendant was never convicted,[106] limited only by rule 403.[107]

Although the circuits are in agreement as to the admissibility of character evidence offered by a defendant, they are presently split over the effect such evidence has once admitted. Most favor an instruction equating character evidence with all other evidence;[108] only one requires the jury to be instructed that evidence of good character standing alone can be sufficient ground for acquittal.[109] No resolution to this conflict is offered by the federal rules.

Rule 404(a)(2) permits the introduction of evidence by the defendant of a pertinent trait of the victim's character in two instances. First, such evidence may be introduced when the victim's character is relevant to or an element of the crime, the classic example being a rape case. If the defendant contends the victim consented, he may introduce evidence about her reputation for chastity since character on this point is probative of the likelihood of consent.[110] Second, evidence of the victim's character may be introduced in a homicide case where the defendant claims he acted in self-defense, in which case the victim's reputation for peace or violence is admissible[111] regardless of the defendant's knowl-

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[106] FED. R. EVID. 404(b).

[107] Sorrells v. United States, 287 U.S. 435, 457 (1932). *But see* United States v. Ambrose, 483 F.2d 742, 748 (6th Cir. 1973) (searching inquiry is subject to limits of exclusionary principles set forth in rule 403); United States v. Kasouris, 474 F.2d 689, 692 (5th Cir. 1973) (where admission of other crime is so tenuous and prejudicial as to outweigh any benefit thereof, it should not be admitted); DeJong v. United States, 381 F.2d 725, 726 (9th Cir. 1967) (evidence of prior misconduct must be confined to similar activities to that charged in indictment).

[108] *E.g.*, Carbo v. United States, 314 F.2d 718, 746 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964); Black v. United States, 309 F.2d 331, 343-44 (8th Cir. 1962), *cert. denied*, 372 U.S. 934 (1963); Moore v. United States, 254 F.2d 213, 221 (5th Cir. 1958); Poliafico v. United States, 237 F.2d 97, 114 (6th Cir. 1956), *cert. denied*, 252 U.S. 1025 (1957); United States v. Lowenthal, 224 F.2d 248, 249 (2d Cir. 1955); United States v. Klass, 166 F.2d 373, 378-80 (3d Cir. 1948); Mannix v. United States, 140 F.2d 250, 253-54 (4th Cir. 1944).

[109] *See* United States v. Donnelly, 179 F.2d 227, 233 (7th Cir. 1950) (court shall instruct jury that evidence of defendant's good character could sufficiently create a reasonable doubt as to defendant's guilt).

[110] Packineau v. United States, 202 F.2d 681, 684-85 (8th Cir. 1953); Gish v. Wisner, 288 F.2d 562, 562 (5th Cir. 1923). *But see* FED. R. EVID. 405 (only evidence of general reputation admissible and not specific instances of unchastity). If the statute in question requires the victim's character to be chaste, then chastity is an element of the crime. Thus, rule 404 would be inapplicable, and the introduction of specific instances of unchastity would be permitted. 2 WEINSTEIN'S EVIDENCE ¶ 404[06], at 404-36 (1976).

[111] Smith v. United States, 161 U.S. 85, 90 (1896).

edge of the deceased's reputation.[112] But whenever a defendant introduces character evidence showing a violent nature, the prosecution may follow with the introduction of a reputation for peace in rebuttal.[113]

Rule 404(b) excludes evidence of other crimes, wrongs, or acts sought to be introduced to prove a person acted in conformity with his bad disposition.[114] It adopts the "inclusionary rule"[115] of previous federal practice that allows evidence of other crimes if relevant for purposes other than proving criminal tendency.[116] While the rule offers no mechanical solution, it does provide a list of several purposes for which admission is justified,[117] although the list is not exhaustive.[118]

Evidence of other crimes tending to show the defendant's act was intentional is admissible. Such evidence, if similar and proximate to the charged offense,[119] can be used to prove that the defendant's explanation of his action is implausible.[120] Furthermore, when a defendant claims a

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[112] Evans v. United States, 277 F.2d 354, 355-56 (D.C. Cir. 1960). *See generally* C. McCORMICK, *supra* note 3, § 193, at 461-62.

[113] 2 WEINSTEIN'S EVIDENCE ¶ 404[06], at 404-38 to -40 (1976). Similarly, under rule 404(a)(3), evidence of a witness' character introduced for impeachment purposes provides another exception to the rule prohibiting character evidence. The admission of such evidence is dealt with specifically in rules 607 through 609.

[114] *See, e.g.*, United States v. Herzburg, 558 F.2d 1219, 1223-24 (5th Cir. 1977) (though evidence of prior wrongs is admissible for some purposes, it may not be used to prove a party's character in general).

[115] United States v. Papadakis, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); United States v. Torres, 519 F.2d 723, 726 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975).

[116] 2 WEINSTEIN'S EVIDENCE ¶ 404[08], at 404-41 to -42 (1976). The majority of courts favor the exclusionary rule, which prohibits all evidence unless it relates to identity, motive, scheme, plan, or knowledge. *Id.*

[117] Though evidence is apparently admissible under rule 404, it is still subject to judicial discretion and rule 403 in order to prevent undue prejudice to the defendant. *See* United States v. Ailstock, 546 F.2d 1285, 1288-90 (6th Cir. 1976) (testimony that defendant had been in prison twice had high prejudicial effect since it did not refer to similar acts).

[118] *See* United States v. Woods, 484 F.2d 127, 134 (4th Cir. 1973) (listed instances where "other crimes" evidence is admissible though not complete), *cert. denied*, 415 U.S. 979 (1974). *See generally* C. McCORMICK, *supra* note 3, at 447-51.

[119] United States v. Taglione, 546 F.2d 194, 199-200 (5th Cir. 1977); United States v. Largent, 545 F.2d 1039, 1045 (6th Cir. 1976), *cert. denied*, 97 S. Ct. 1117 (1977).

[120] United States v. Porter, 544 F.2d 936, 939 (8th Cir. 1976); United States v. Adderly, 529 F.2d 1178, 1181-82 (5th Cir. 1976); United States v. Kirk, 528 F.2d 1057, 1061 (5th Cir. 1976); Lord v. C.I.R., 525 F.2d 741, 745 (9th Cir. 1975). In United States v. Urdiales, 523 F.2d 1245 (5th Cir. 1975), the court listed four criteria for applying the exception: (1) evidence of a prior similar offense must be plain, clear, and convincing, (2) it must not be too remote in time, (3) intent must be a material element in the offense, and (4) the need for proof of intent outweighs material prejudice. However, there is a difference of opinion over whether intent must be a contested issue before evidence of other crimes is admissible. *Id.* at 1247; *cf.* United States v. Ring, 513 F.2d 1001, 1007 (6th

lack of guilty knowledge, rule 404(b) can be invoked to show a likelihood that the defendant knew the criminal act was being perpetrated.[121]

Evidence of other crimes is also admissible under rule 404(b) to show that the defendant is the person who committed the offense for which he is charged. Such evidence may include similar clothes or materials used in the commission of previous crimes,[122] evidence of the same or similar method of operation,[123] evidence of handwriting,[124] testimony of witnesses called for identification purposes,[125] and even photographs of the defendant where their use is not too prejudicial.[126] Additionally, evidence of prior criminal acts is admissible to show the defendant's motive for the crime charged,[127] since the reasons for his prior actions furnish the basis for an inference that he committed the instant act.[128]

A plan or design of which the instant crime is a part can be shown by evidence of other crimes. In this regard, questions typically arise in three situations. First, such evidence may be introduced to reveal a broader scheme surrounding a particular transaction.[129] For example, in the case of a defendant charged with stealing the property of one person, if the defendant has also stolen the property of other persons, the evidence about the other stolen property is admissible to establish a com-

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Cir. 1975) (prohibiting evidence of defendant's prior threats because "intent was not a genuinely contested issue").

[121] *E.g.*, United States v. Moss, 544 F.2d 954, 961-62 (8th Cir. 1976), *cert. denied*, 97 S. Ct. 822 (1977); United States v. Wixom, 529 F.2d 217, 220 (8th Cir. 1976); United States v. Marshall, 526 F.2d 1349, 1360-61 (9th Cir.), *cert. denied*, 426 U.S. 923 (1976); United States v. Beaver, 524 F.2d 963, 965 (5th Cir. 1975), *cert. denied*, 426 U.S. 923 (1976); United States v. Leaphart, 513 F.2d 747, 748 (10th Cir. 1975); United States v. McCord, 509 F.2d 891, 895 (7th Cir.), *cert. denied*, 423 U.S. 833 (1975).

[122] United States v. Kimbrough, 528 F.2d 1242, 1248-49 (7th Cir. 1976); United States v. Eatherton, 519 F.2d 603, 611 (1st Cir.), *cert. denied*, 423 U.S. 987 (1975).

[123] *E.g.*, United States v. Mahar, 519 F.2d 1272, 1273 (6th Cir.), *cert. denied*, 423 U.S. 1020 (1975).

[124] *E.g.*, United States v. Grammar, 513 F.2d 673, 677 (9th Cir. 1975). *See also* United States v. Maestas, 546 F.2d 1177, 1181-82 (5th Cir. 1977).

[125] *E.g.*, Sanchez v. United States, 341 F.2d 565, 566-67 (5th Cir.), *cert. denied*, 382 U.S. 860 (1965).

[126] *See, e.g.*, United States v. Plante, 472 F.2d 829, 831 (1st Cir.) (photo admitted as rebuttal to defendant's claim of having a beard even though defendant later offered to stipulation of the fact), *cert. denied*, 411 U.S. 950 (1973); *cf.* Barnes v. United States, 365 F.2d 509, 510-11 (D.C. Cir. 1966) (mug shot inadmissible even though prison numbers taped over, especially since defendant had not disputed physical characteristics evident in photograph).

[127] United States v. Johnson, 542 F.2d 230, 234 n.10 (5th Cir. 1976).

[128] United States v. Caci, 401 F.2d 664, 670 (2d Cir. 1968).

[129] *E.g.*, United States v. Calvert, 523 F.2d 895, 907 (8th Cir. 1975); United States v. Marchildon, 519 F.2d 337, 346 (8th Cir. 1975).

mon plan or design related to the crime charged.[130] Second, evidence of other crimes is admissible to show the defendant was engaged in a definite scheme leading to the commission of the crime in question.[131] Finally, evidence of a prior use of a unique plan or scheme for the commission of the same crime is admissible under the plan or design exception, and if the evidence clearly tends to support a finding that the similarities in the scheme make the defendant the probable perpetrator of both, it is then relevant.[132] Yet, even though this evidence of other crimes may have probative value, the question of admissibility is left to the court's discretion.[133]

The Mississippi Supreme Court has adopted the position that, in an ordinary civil case, a party may offer proof of his good character or reputation[134] only when character is a necessary issue to be resolved in the case.[135] Satisfaction of this criterion is determined solely by the nature of the action.[136] For example, in cases of false imprisonment,[137] defamation,[138] and breach of promise to marry,[139] the characters of the parties are vital elements of the actions. Likewise, evidence of reputation is admissible to establish a common law marriage,[140] to disprove paternity,[141] and even to rebut a specific allegation charging a physician

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[130] Morgan v. United States, 355 F.2d 43, 45 (10th Cir.), *cert. denied,* 384 U.S. 1025 (1966).

[131] United States v. Drebin, 557 F.2d 1316, 1325-26 (9th Cir. 1977); United States v. Maestas, 546 F.2d 1177, 1181-82 (5th Cir. 1977); United States v. Natale, 526 F.2d 1160, 1173-74 (2d Cir.), *cert. denied,* 425 U.S. 956 (1975).

[132] United States v. Mahar, 519 F.2d 1272, 1273 (6th Cir.), *cert. denied,* 423 U.S. 1020 (1975).

[133] Admissibility is determined by use of the balancing approach which involves construction of rule 404 in connection with rule 403. United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967). One problem is the proper application of the necessity rule, which would exclude evidence of other crimes if not essential to prove the government's case. *See, e.g.,* United States v. Byrd, 352 F.2d 570, 575 (2d Cir. 1965). If there is doubt as to whether the evidence is needed, the court is justified in exclusion until the government's case is completed and a proper determination made. 2 WEINSTEIN'S EVIDENCE ¶ 404[10], at 404-70 (1976).

[134] DeLaughter v. Womack, 250 Miss. 190, 206-07, 164 So. 2d 762, 769 (1964); Millers Mut. Fire Ins. Co. v. King, 232 Miss. 260, 266, 98 So. 2d 662, 663 (1957).

[135] Millers Mut. Fire Ins. Co. v. King, 232 Miss. 260, 268, 98 So. 2d 662, 663 (1957); Graves v. Johnson, 179 Miss. 465, 484, 176 So. 256, 262 (1937).

[136] Graves v. Johnson, 179 Miss. 456, 484, 176 So. 256, 262 (1937).

[137] *E.g.,* Harris v. Sims, 155 Miss. 207, 215, 124 So. 325, 327 (1929).

[138] New Orleans Great N.R.R. v. Graham, 158 Miss. 407, 419, 130 So. 493, 496 (1930).

[139] Freed v. Killman, 192 Miss. 643, 646, 6 So. 2d 909, 909 (1942); Carney v. McGilvray, 152 Miss. 87, 98, 119 So. 157, 160 (1928).

[140] Butler's Estate v. McQuarters, 210 Miss. 86, 89, 48 So. 2d 617, 618 (1950); Walker v. Matthews, 191 Miss. 489, 509, 3 So. 2d 820, 825 (1941); Sykes v. Sykes, 162 Miss. 487, 493, 139 So. 853, 854 (1932).

[141] Crum v. Brock, 136 Miss. 858, 867, 101 So. 704, 705 (1924); Anonymous, 37 Miss. 54, 58 (1859).

with want of skill and care.[142] But in civil cases where a party is charged "with committing a legal wrong, or even an act for which he might be subjected to criminal prosecution, such as conspiracy, embezzlement, fraud, or incendiarism,"[143] Mississippi courts follow the majority rule[144] and exclude character evidence because character, not being at issue, is irrelevant.

In criminal cases the Mississippi Supreme Court firmly adheres to the "rule that testimony cannot be introduced . . . to show bad reputation of a defendant until he has put his reputation in issue by offering testimony to show good character."[145] The character of the accused may be placed at issue in several ways, including direct examination of a character witness offered by the defendant[146] and cross-examination of a prosecution witness.[147] Statutes[148] that permit defendants who elect to testify to be impeached as other witnesses by revelation of prior convictions can likewise place character at issue.[149] Similarly, the defendant's veracity may be tested by the prosecution through an inquiry about

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[142] Shaw v. Klein, 121 Miss. 411, 412, 83 So. 620, 620 (1919).

[143] Millers Mut. Fire Ins. Co. v. King, 232 Miss. 260, 266, 98 So. 2d 662, 663 (1957); *cf.* Meador v. Hotel Grover, 193 Miss. 392, 405, 9 So. 2d 782, 786 (1942) (decedent's character or status as lawbreaker at moment of death had no effect on right to recover damages).

[144] C. McCormick, *supra* note 3, § 188, at 445.

[145] Sharplin v. State, 330 So. 2d 591, 596 (Miss. 1976); Hamilton v. State, 197 So. 2d 469, 472 (Miss. 1967). The proof of character or general reputation, however, must be confined to the time of the crime and not the time of the trial. Brooks v. State, 52 So. 2d 616, 620 (Miss. 1951), *cert. denied,* 342 U.S. 863 (1952). Just as the defendant cannot be forced to incriminate himself, neither can he be denied the opportunity to establish his good character. The rule in Mississippi is:

> Proof of good previous character of a defendant in a criminal prosecution is admissible as a matter of right. Character is used in this sense as being the same as general reputation. But the evidence relating to such general reputation should be confined to the particular trait or traits involved in the nature of the charge against the defendant.

Rosser v. State, 230 Miss. 573, 577, 93 So. 2d 470, 471 (1957); *accord,* De Angelo v. State, 187 Miss. 84, 96, 192 So. 444, 447 (1944); Jefferson v. State, 102 Miss. 174, 178, 59 So. 8, 8 (1912); Westbrooks v. State, 76 Miss. 710, 713, 25 So. 491, 492 (1899).

[146] Rosser v. State, 230 Miss. 573, 577, 93 So. 2d 470, 471 (1951). *But cf.* Webb v. State, 111 Miss. 419, 420, 71 So. 738, 739 (1916) (character not placed at issue when defense witness was asked on direct examination whether or not he knew defendant's reputation and responded negatively).

[147] Hamilton v. State, 197 So. 2d 469, 472-73 (Miss. 1967); Brethren v. State, 191 Miss. 151, 152, 2 So. 2d 798, 798 (1941).

[148] Miss. Code Ann. § 13-1-13 (1972).

[149] Bridges v. State, 336 So. 2d 1309, 1310 (Miss. 1976); Thornton v. State, 313 So. 2d 16, 18 (Miss. 1975). In this context conviction means "nothing less than a final judgment, conclusively establishing guilt." Murphree v. Hudnall, 278 So. 2d 427, 428 (Miss. 1973).

prior convictions, even if an appeal is being pursued at the time of trial.[150] The prosecutor may not, however, ask about mere allegations of wrongdoings,[151] indictments,[152] grand jury censures,[153] justice court convictions,[154] or convictions entered upon pleas of nolo contendere.[155] Character evidence is also proper when the defense of insanity is interposed, even though the defendant does not directly raise the issue.[156] In contrast, where the defense of entrapment is employed, evidence of the defendant's character is admissible only after the accused has raised the defense.[157] Only then may the prosecution offer character evidence that tends to establish the defendant's propensity to act in the manner for which he is charged as a counter to the entrapment plea.[158] Yet, despite these guidelines for the admission of evidence regarding the defendant's character, the improper admission of such evidence is not necessarily reversible error. After balancing the tainted evidence with other evidence, the court may find the error to have been harmless.[159]

As a general rule, evidence pertaining to the victim's character and reputation cannot be introduced by the prosecution unless the defendant has first assailed such character and reputation.[160] In murder cases, however, the Mississippi Supreme Court has enunciated several exceptions:

> The violent, dangerous and turbulent character of a deceased may be shown: (A) when, from the circumstances of the case, it is part of the res gestae . . .; (B) where the evidence of the homicide is wholly

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[150] Nicholson v. State, 254 So. 2d 881, 883-84 (Miss. 1971).

[151] Haralson v. State, 314 So. 2d 722, 723 (Miss. 1975).

[152] Barlow v. State, 233 So. 2d 829, 832 (Miss. 1970).

[153] *Id.*

[154] Keyes v. State, 312 So. 2d 7, 9 (Miss. 1975).

[155] *Id.* at 10.

[156] Warren v. State, 285 So. 2d 756, 759 (Miss. 1973); *see* McLeod v. State, 217 So. 2d 389, 391 (Miss. 1975) (every act of the party's life relevant to insanity issue admissible); McGarrh v. State, 249 Miss. 247, 256, 148 So. 2d 494, 496 (1963) (same).

[157] Hamilton v. State, 295 So. 2d 739, 741 (Miss. 1974).

[158] *See* Jones v. State, 285 So. 2d 152, 160 (Miss. 1974) (adopting the rationale of Sorrels v. United States, 287 U.S. 435 (1932), the court ruled that, upon claiming entrapment, the defense opens an avenue for the prosecution to attack the defendant's reputation if relevant). *But see* Hamilton v. State, 295 So. 2d 739, 741 (Miss. 1974) (until entrapment is specifically alleged, the prosecution may not challenge defendant's reputation in anticipation of the defense).

[159] Pope v. State, 242 Miss. 362, 365, 135 So. 2d 818, 819 (1961); Hinton v. State, 209 Miss. 608, 621, 46 So. 2d 445, 445 (1959). *But see* Pegram v. State, 223 Miss. 294, 302, 78 So. 2d 153, 156 (1955) (sufficiently prejudicial character evidence constituted fatal error); Smothers v. City of Jackson, 92 Miss. 327, 330, 45 So. 982, 982 (1908) (same).

[160] Simmons v. State, 206 Miss. 535, 538, 40 So. 2d 289, 291 (1949); Richardson v. State, 123 Miss. 232, 234-35, 85 So. 186, 187 (1920); Woods v. State, 90 Miss. 245, 248, 43 So. 433, 433 (1907); Baker v. State, 82 Miss. 84, 87, 33 So. 716, 716 (1903).

> circumstantial . . .; (C) where it is doubtful as to who the aggressor was at the time of the homicide . . .; or (D) where the immediate circumstances of the killing render it doubtful as to whether or not the act was justifiable.[161]

A defendant seeking to invoke one or more of these specific exceptions must first plead and give some evidence of self-defense.[162] Furthermore, if the defendant seeks to introduce evidence of the deceased victim's reputation for peace and violence to justify his apprehension or fear, he must establish personal knowledge of the victim's propensities at the time of the event.[163] On the other hand, if evidence pertaining to the victim's character is offered merely to show that he was the first aggressor, personal knowledge need not be shown.[164] While evidence of the character of the prosecutrix in a rape prosecution may be offered by the defendant to prove consent[165] or prior inchastity,[166] the state may also introduce evidence to prove actual chastity[167] or to enhance the victim's credibility.[168]

Evidence of other crimes, wrongs, or acts is generally excluded in Mississippi because it tends to establish defective character, leading to an inference that the one having such character acted in conformity on a particular occasion. Thus, unlike rule 404, Mississippi follows the

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[161] Shinall v. State, 199 So. 2d 251, 257 (Miss.), *cert. denied*, 389 U.S. 1014 (1967); *see* Washington v. State, 307 So. 2d 430, 431-32 (Miss. 1975) (determination of the aggressor); Rucker v. State, 248 Miss. 65, 70-72, 158 So. 2d 39, 40-42 (1963) (same); King v. State, 65 Miss. 576, 582 (1888) (res gestae); Chase v. State, 46 Miss. 683, 704 (1872) (proof of killing circumstantial); Wesley v. State, 37 Miss. 327, 346 (1859) (res gestae). *But see* Newsome v. State, 197 Miss. 797, 802, 20 So. 2d 708, 708 (1945) (refused offer of proof that defendant had been told by deceased of his having killed three people, leading defendant to fear the deceased's dangerous propensities).

[162] Freeman v. State, 204 So. 2d 842, 843-46 (Miss. 1967); Smith v. State, 75 Miss. 542, 554-55, 23 So. 260, 264 (1948); *cf.* Pinter v. State, 203 Miss. 344, 348, 34 So. 2d 723, 724 (1948) (with no self-defense pleaded, evidence of victim's violent character inadmissible). *But see* McDonald v. State, 218 So. 2d 21, 22 (Miss. 1969) (even though defendant pleaded self-defense, the evidence was held inadmissible when court found he actually contended the decedent's killing was accidental).

[163] Freeman v. State, 204 So. 2d 842, 844-45 (Miss. 1969); Tillman v. State, 225 Miss. 275, 285, 83 So. 2d 86, 88 (1955).

[164] Freeman v. State, 204 So. 2d 842, 844 (Miss. 1969); Shinall v. State, 199 So. 2d 251, 257 (Miss.), *cert. denied*, 389 U.S. 104 (1967). Mississippi applies this rule to both homicide and assault cases, Hinton v. State, 209 Miss. 608, 621, 45 So. 2d 805, 808 (murder), *cert. denied*, 340 U.S. 802 (1951); Woods v. State, 90 Miss. 245, 245, 43 So. 433, 433 (1907) (assault with intent to kill), while rule 404 applies only to the former.

[165] Wilson v. State, 264 So. 2d 828, 830 (Miss. 1972); Shay v. State, 229 Miss. 186, 192, 90 So. 2d 209, 211 (1956).

[166] Wilkerson v. State, 106 Miss. 633, 637, 64 So. 420, 420 (1914).

[167] Kolb v. State, 129 Miss. 834, 850, 93 So. 358, 361 (1922).

[168] Turney v. State, 16 Miss. (8 S. & M.) 104, 104 (1847).

majority exclusionary rule[169] that evidence must be limited to the crime charged and proof of the accused's guilt of a prior offense is inadmissible.[170] The Mississippi rule extends not only to prior convictions,[171] but to indictments[172] and occurrences of a noncriminal nature as well.[173]

Despite the differences, Mississippi is not completely at odds with rule 404, and the supreme court has recognized many exceptions that conform with the federal rule. For example, evidence of other crimes may be offered to establish motive,[174] opportunity,[175] intent,[176] prepara-

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[169] See notes 115 & 116 and accompanying text *supra*.

[170] Herman v. State, 75 Miss. 340, 345, 22 So. 873, 873 (1898); *accord,* Sims v. State, 313 So. 2d 27, 30 (Miss. 1975); Mills v. State, 304 So. 2d 651, 653 (Miss. 1974); *cf.* Griffin v. State, 292 So. 2d 159 (Miss. 1974) (prior convictions may be used only to attack defendant's credibility); Reid v. State, 266 So. 2d 21, 26 (Miss. 1972) (evidence of prior fight between accused and victim admitted as exception to general rule since it was relevant to show motive).

[171] Riley v. State, 254 Miss. 86, 94, 180 So. 2d 321, 325 (1965).

[172] Ladnier v. State, 254 Miss. 469, 474-75, 182 So. 2d 389, 391-92 (1966).

[173] May v. State, 199 So. 2d 635, 640-41 (Miss. 1967); Raines v. State, 81 Miss. 489, 497-98, 33 So. 19, 21 (1902).

[174] *See, e.g.,* Reid v. State, 226 So. 2d 21, 26-27 (Miss. 1972) (fights on same night at beer joint admissible to show motive for defendant's return to "shoot up" the place); Ladner v. State, 197 So. 2d 257, 263-64 (Miss. 1967) (prior mistreatment of wife admissible to prove motive of husband for murder of wife); Horton v. State, 288 So. 2d 467, 468 (Miss. 1964) (testimony of police officer that he knew defendant was wanted on felony charge admissible to establish motive of defendant, who shot officer during arrest attempt). *But see* May v. State, 199 So. 2d 635, 641 (Miss. 1967) (prior mistreatment of wife irrelevant in trial for wife's homicide); Hawkins v. State, 224 Miss. 309, 324-25, 80 So. 2d 1, 8-9 (1955) (evidence of prior questionable insurance recoveries inadmissible to prove defendant murdered wife for insurance proceeds); Floyd v. State, 166 Miss. 15, 34, 148 So. 226, 230 (1933) (evidence of defendant's prior mistreatment of wife inadmissible since issue was whether wife was hysterical enough to inflict wounds upon herself, not how or why she became hysterical); Raines v. State, 81 Miss. 489, 496-98, 33 So. 19, 20-21 (1902) (prior mistreatment of wife inadmissible in trial for wife's homicide).

[175] *See, e.g.,* Kolb v. State, 129 Miss. 834, 849, 93 So. 358, 360 (1922) (prior intimate relations with prosecutrix admissible to show opportunity of defendant to commit the statutory rape charged); *cf.* Kimbrall v. State, 178 Miss. 701, 704, 174 So. 47, 49 (1937) (larceny other than the one charged in indictment admissible when committed on same night charged robbery occurred and when defendant was seen driving truck in area where both victims lived); Stepney v. City of Columbia, 157 Miss. 193, 197, 127 So. 687, 688 (1930) (tin funnel and two cork bottle stoppers admissible to prove illegal sale of liquor).

[176] *See, e.g.,* Readus v. State, 272 So. 2d 659, 661 (Miss. 1973) (prior shooting of wife admissible as bearing on question whether subsequent shotgun slaying of wife by defendant was accident); Brooks v. State, 242 So. 2d 865, 870 (Miss. 1971) (acts of sexual intercourse between the same parties prior to alleged rape admissible); Riley v. State, 254 Miss. 86, 97, 180 So. 2d 321, 326 (1965) (evidence showing accused engaged in alleged offense on two previous occasions admissible); Lee v. State, 244 Miss. 813, 821, 146 So. 2d 736, 739 (1962) (evidence that defendant obtained acknowledgement of victims' signatures in their absence by having notary's secretary sign notary's name and affix seal admissible to show intent to obtain victim's home by false pretenses).

tion,[177] plan,[178] knowledge,[179] identity,[180] absence of mistake, and accident.[181] Mississippi also allows evidence of other crimes to be introduced if they are inseparably interwoven with the charged offense,[182] or fall within the res gestae of the event in question.[183]

Even though evidence of other crimes might fall within one of the recognized exceptions, admissibility may still be precluded on grounds of prejudice or remoteness.[184] The "test is its logical relevancy to the particular excepted purpose or purposes for which the evidence of prior offenses is sought to be introduced."[185] However, if evidence of other crimes is essential to prosecution of the case,[186] or is offered for a purpose other than to establish the defendant's propensity to act in a certain fashion,[187] it probably will be admitted. Alternatively, the weight and sufficiency of the evidence as a whole might render an otherwise erroneous admission of evidence of "other crimes" harmless error.[188]

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[177] Reid v. State, 266 So. 2d 21, 26-27 (Miss. 1972); Smith v. State, 223 So. 2d 657, 660 (Miss. 1969), *cert. denied*, 397 U.S. 1030 (1970); Stone v. State, 210 Miss. 218, 226-27, 49 So. 2d 263, 266 (1957).

[178] Butler v. State, 217 Miss. 750, 759, 65 So. 2d 244, 248 (1953).

[179] Thompson v. State, 309 So. 2d 533, 534 (Miss.), *cert. denied*, 423 U.S. 924 (1975); Strickland v. State, 209 So. 2d 840, 841 (Miss. 1968); Steele v. State, 213 Miss 736, 738, 57 So. 2d 572, 573 (1952).

[180] Wilson v. State, 243 Miss. 859, 874-78, 140 So. 2d 275, 282-83 (1962); Crafton v. State, 200 Miss. 10, 14-15, 26 So. 2d 347, 348 (1946).

[181] Readus v. State, 272 So. 2d 659, 661 (Miss. 1973); May v. State, 199 So. 2d 635, 641-42 (Miss. 1967).

[182] *E.g.*, Thompson v. State, 309 So. 2d 533, 534 (Miss.), *cert. denied*, 423 U.S. 924 (1976); Younger v. State, 301 So. 2d 300, 305 (Miss. 1975); Tanner v. State, 216 Miss. 150, 157, 61 So. 2d 781, 784 (1953); Bangren v. State, 198 Miss. 359, 370, 22 So. 2d 360, 361 (1945); Kimbrall v. State, 178 Miss. 701, 704-05, 174 So. 47, 48 (1938). *See also* Fortenberry v. State, 227 Miss. 666, 670-71, 86 So. 2d 663, 664 (1956).

[183] *E.g.*, Hosey v. State, 300 So. 2d 453, 454 (Miss. 1974); Ellis v. State, 255 So. 2d 325, 326-27 (Miss. 1971); Grinnell v. State, 230 So. 2d 555, 556-57 (Miss. 1970); Turner v. State, 244 Miss. 206, 210, 141 So. 2d 249, 250 (1962); Whittington v. State, 160 Miss. 705, 710, 135 So. 190, 191 (1931); Keel v. State, 133 Miss. 160, 165, 97 So. 521, 522 (1923).

[184] *See, e.g.*, May v. State, 199 So. 2d 635, 641 (Miss. 1967) (prior marital difficulties prejudicial in trial of husband for murder of wife); Herman v. State, 75 Miss. 340, 345-46, 22 So. 873, 873-74 (1898) (assault one year earlier too remote); *cf.* Gillespie v. State, 215 Miss. 380, 385-88, 61 So. 2d 150, 152 (1952) (attempted rape one year earlier too remote, but admitted because no timely objection was raised). *But see* Shorter v. State, 257 So. 2d 236, 239 (Miss. 1972) (fifteen-year-old conviction allowed); Stewart v. State, 226 So. 2d 911, 912 (Miss. 1969) (remoteness a question for trial judge).

[185] Brooks v. State, 242 So. 2d 865, 869 (Miss. 1971).

[186] *See* Cummings v. State, 321 So. 2d 294, 295 (Miss. 1975) (evidence of attempted use of stolen credit card admissible not to show separate offense, but to corroborate testimony that defendant possessed the stolen goods); West v. State, 218 Miss. 397, 408, 67 So. 2d 366, 370 (1953) (photograph of victim's body admissible to prove corpus delicti).

[187] Strickland v. State, 209 So. 2d 840, 841 (Miss. 1968).

[188] Pope v. State, 242 Miss. 362, 365, 135 So. 2d 818, 819 (1962); Williams v. State, 188 Miss. 381, 386, 195 So. 338, 339 (1940).

In civil actions, Mississippi follows the general rule that evidence of other acts of negligence is inadmissible to prove negligence.[189] Such evidence is competent, however, to establish the existence[190] or knowledge[191] of a dangerous condition, even though this evidence is only admitted in cases where other proof of negligence is present.[192] Similarly, evidence of other acts or transactions is allowed when agency[193] is at issue, even as bearing on the question of intent.[194]

In summary, the differences between Mississippi practice and the provisions of rule 404 appear to be more technical than substantive. Perhaps the most obvious difference lies in the inclusionary versus exclusionary rule. The distinction, however, is more theoretical than practical. The Mississippi rule also differs from rule 404 by permitting character evidence in assault cases as well as homicide. Since the question of who was the aggressor is of equal importance in both types of cases, the Mississippi position is more sound as a policy matter.

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[189] Hartford Ins. Group v. Massey, 216 So. 2d 415, 417 (Miss. 1968); Tribette v. Illinois Cent. R.R., 71 Miss. 212, 233, 13 So. 899, 902 (1893); Miss. Cent. R.R. v. Miller, 40 Miss. 45, 47-48 (1866). *See also* Sparks v. Southeastern Grayhound Lines, 173 F. Supp. 896, 902 (N.D. Miss. 1959); Yazoo & M.V.R.R. v. Pittman, 169 Miss. 667, 675, 153 So. 382, 384 (1934).

[190] *See* Gulf Hills Dude Ranch, Inc. v. Brinson, 191 So. 2d 856, 861 (Miss. 1966) (slippery floor); Illinois Cent. R.R. v. Williams, 242 Miss. 586, 605-06, 135 So. 2d 831, 839 (1961) (grade crossing); S. H. Kress & Co. v. Marklin, 117 Miss. 37, 46-47, 77 So. 858, 861-62 (1918) (open elevator shaft).

[191] *See* Yazoo & M.V.R.R. v. Hare, 104 Miss. 564, 573-74, 61 So. 648, 648-49 (1913) (negligence in hiring violent employee); Magouirk v. Telegraph Co., 79 Miss. 632, 636-37, 31 So. 207 (1901) (same). *But see* J.W. Sanders Cotton Mill v. Moody, 189 Miss. 284, 299-300, 195 So. 683, 688 (1940) (evidence of inattention to similar machines in same plant inadmissible to establish knowledge of a dangerous machine or its negligent maintenance).

[192] Hartford Ins. Group v. Massey, 216 So. 2d 415, 417 (Miss. 1968). Conversely, absence of accidents or occurrences similar to the one being litigated has probative value in rebutting charges of danger, knowledge, and the like. *See* Southern Ry. v. McLellan, 80 Miss. 700, 709, 32 So. 283, 284 (1902) (evidence that no accident of similar type had previously occurred should have been admitted); Lawler v. Skelton, 241 Miss. 274, 287, 130 So. 2d 565, 569 (1961) (no adverse reaction to accidental spraying with insecticides).

[193] Stonewall Life Ins. Co. v. Cooke, 165 Miss. 619, 644, 144 So. 217, 222-23 (1932); Myers Constr. Co. v. Batson, 156 Miss. 689, 692, 126 So. 822, 823 (1932).

[194] *See* Wilkerson v. Randall, 254 Miss. 546, 556, 180 So. 2d 303, 306 (1965) (in a case of malicious prosecution, conduct subsequent to event in question probative of intent); Citizen's Nat'l Bank v. Pigford, 176 Miss. 517, 534-35, 166 So. 749, 752 (1936) (testimony of witness who purchased bonds from same salesman as did plaintiff admissible since similar transaction indicated intent of defendant); Nash Miss. Valley Motor Co. v. Childress, 156 Miss. 157, 164, 125 So. 708, 710 (1930) (prior tampering with speedometers).

Rule 405. Methods of Proving Character[195]

Rule 405 provides for the methods that may be used to prove character once admissibility has been established under rule 404. Character can be proved three ways: reputation, opinion, or specific instances of conduct.[196] The method used is dependent on the purpose for which the character evidence is offered. Where character is used as circumstantial evidence to prove a fact consequential to the action, but is not an essential element or issue, only evidence of general reputation and opinion may be used.[197] On the other hand, if character is either directly at issue or an essential element of the case, specific instances of conduct are proper.[198] Rule 405 has no application to, and consequently, imposes no limitations on proving such elements as intent, plan, design, and motive under rule 404(b) since, at least in theory, such evidence is not introduced to prove a person acted in conformity with his character.[199]

In allowing evidence of reputation, rule 405 follows the previous federal and majority rules that permit circumstantial proof to impeach the credibility of a witness or, when offered by the defendant or the prosecution in rebuttal, to prove either the defendant's or victim's character.[200] After character has been made an issue, any testimony must relate to the subject's reputation in the community where he resides,[201] must be related to the character trait in question,[202] and must be confined to the time relevant to the incident or trait at issue.[203] The witness must be able to show further that he is familiar with defendant's reputa-

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[195] Fed. R. Evid. 405 provides:

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

See Criminal Law ⚿ 375-81; Evidence ⚿ 106(5); Witnesses ⚿ 274.

[196] Rule 405, insofar as it permits the introduction of opinion evidence, departs from the majority and prior federal rule. Fed. R. Evid. 405, Advisory Comm. Notes.

[197] United States v. Lewis, 482 F.2d 632, 637 (D.C. Cir. 1975); United States v. Curry, 512 F.2d 1299, 1305 (4th Cir. 1975).

[198] Christy v. United States, 68 F.R.D. 375, 378 (N.D. Tex. 1975).

[199] 2 Weinstein's Evidence ¶ 405[04], at 405-39 (1976).

[200] Fed. R. Evid. 405, Advisory Comm. Notes.

[201] *See* Michelson v. United States, 335 U.S. 469, 477 (1948) (witness may summarize what he has heard in the community); Awkard v. United States, 352 F.2d 641, 641 n.2 (D.C. Cir. 1965) (reputation to be proved should be defendant's reputation in his home community proximate to the time of the crime).

[202] Aaron v. United States, 397 F.2d 584, 585 (5th Cir. 1968).

[203] Gross v. United States, 394 F.2d 216, 219-20 (8th Cir. 1968); Awkard v. United States, 352 F.2d 641, 642 n.1 (D.C. Cir. 1965).

tion.[204] Since such evidence is unquestionably a summary of the witness' assessment of what he has heard from many and varied sources, it constitutes an exception to the hearsay rule,[205] and although it is far from totally reliable, reasons of convenience justify admission.[206]

Once character has become relevant, the prosecution may cross-examine the defendant's witnesses and call its own witnesses in rebuttal. Although testimony of specific acts by the defendant is not permissible,[207] the prosecution may question witnesses about defendant's acts in order to test their knowledge of his reputation.[208] The proper inquiry involves a witness' knowledge of what he has heard about the defendant and not what he otherwise knows.[209] The scope of the inquiry should be limited in time,[210] and the provisions of rule 403[211] must be considered in balancing prejudicial effect against probative value.[212]

Rule 405's recognition of opinion as a method for proving character rejects the more current federal rule[213] in favor of the older view propounded by Professor Wigmore.[214] This departure from the common law is based upon the premise that in our urban society the average person has little opportunity to gain a community reputation and the only people capable of forming a valid opinion of a person's character are those who have a personal relationship with him.[215] The rule extends beyond friends to allow anyone competent to form an opinion of a person's character to testify, such as experts who have examined or treated the person whose character is in question.[216] Furthermore, in proving character by opinion, the witness may testify in general terms about the basis for the opinion, but not about the specific incidents supporting it.[217]

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[204] Whiting v. United States, 296 F.2d 512, 517 (1st Cir. 1961).

[205] Michelson v. United States, 335 U.S. 469, 477-78 (1948).

[206] *See generally* 5 J. WIGMORE, *supra* note 4, § 1610.

[207] *See* United States v. Curry, 512 F.2d 1299, 1305 (4th Cir. 1975).

[208] 2 WEINSTEIN'S EVIDENCE ¶ 405[02], at 405-20 (1976); *see* United States v. Bermudez, 526 F.2d 89, 95 (2d Cir. 1975) (proper in case for possession of cocaine to ask character witness whether he "had heard" that the defendant had been previously arrested on marijuana charges).

[209] Michelson v. United States, 335 U.S. 469, 479, 482 (1948); United States v. Franklin, 471 F.2d 1299, 1301-02 (5th Cir. 1973).

[210] FED. R. EVID. 609(b) (establishment of time limit).

[211] *See id.* 403.

[212] *See generally* Sherman v. United States, 352 F.2d 449, 454 (D.C. Cir. 1965) (balancing approach discussed).

[213] FED. R. EVID. 405, Advisory Comm. Notes.

[214] 7 J. WIGMORE, *supra* note 4, § 1986, at 168-69.

[215] *See generally* 3 J. WIGMORE, *supra* note 4, § 924(b).

[216] *See, e.g.*, United States v. Ridling, 350 F. Supp. 90, 98-99 (E.D. Mich. 1972) (polygraph examiner); Okon v. Roland, 247 F. Supp. 743, 747-50 (S.D.N.Y. 1965) (psychiatrist).

[217] The last paragraph of FED. R. EVID. 405, Advisory Comm. Notes provides:

Where evidence of specific misconduct is offered as evidence of a fact at issue, or is offered to show such elements as intent, knowledge, or plan under rule 404(b), rule 405 does not apply.[218] Specific acts are admissible only when the character of a person is an essential element of a charge, claim, or defense.[219] The rule does not permit evidence of specific acts by a defendant to prove his good character,[220] nor will it permit evidence of particular acts of the complaining witness' unchastity in a rape case on the issue of consent.[221]

In Mississippi, character evidence may take the form of either general reputation or specific instances of conduct, depending upon the purpose for which it is introduced. Contrary to the minority position embodied within rule 405,[222] Mississippi does not permit strict opinion evidence to prove character.[223] With regard to reputation evidence, the Mississippi position[224] is similar to that of rule 405. If character is in-

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The express allowance of inquiry into specific instances of conduct on cross examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, *i.e.*, be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701.

[218] *See generally* 2 WEINSTEIN'S EVIDENCE ¶ 405[04], at 405-39 (1976).

[219] Christy v. United States, 68 F.R.D. 375, 378 (N.D. Tex. 1975).

[220] 2 WEINSTEIN'S EVIDENCE ¶ 405[04], at 405-39 (1976).

[221] *Id.* at 405-40.

[222] See note 196 and accompanying text *supra.*

[223] *See* Rodgers v. State, 204 Miss. 891, 894-95, 36 So. 2d 155, 156 (1948) (testimony to impeach rape victim's chastity is limited to evidence of her general reputation); Benson v. State, 79 Miss. 538, 540-42, 31 So. 200, 200-01 (1901); *cf.* Brooks v. State, 242 So. 2d 865, 868 (Miss. 1971) ("A witness must qualify to give an opinion by showing acquaintance with the person and with the community in which he has lived."). *But see* Kearney v. State, 68 Miss. 233, 238, 8 So. 292, 293 (1890). "The reputation of the person, or at most what particular witnesses believe of him from his course of life [defines] the rule. One who puts his character in issue is supposed to be prepared to defend it by showing such habits as to generally impress the community or particular persons who knew him favorably." *Id.*

Most probably, Mississippi has achieved a compromise between proof of character by general reputation and personal opinion. The existence of such a compromise has been noted by Wigmore. 7 J. WIGMORE, *supra* note 4, § 1985, at 159. It consists of establishing the general reputation of the subject, followed by a question concerning the witness' belief in the subject's conformity to that reputation. *Id.; see* French v. State, 63 Miss. 386, 393-94 (1885) (knowing the subject's good reputation for honesty, witness may be asked if he would believe the subject under oath).

[224] The Mississippi rule regarding "general reputation" is fully applicable to civil cases where character evidence is relevant. *See, e.g.*, Harris v. Sims, 155 Miss. 207, 214, 124 So. 325, 327 (1929) (false imprisonment); Carney v. McGilvray, 152 Miss. 87, 95-97, 119 So. 157, 159-60 (1928) (breach of marriage promise).

jected into the case as circumstantial evidence of the truth or falsity of a material but nonessential element, only evidence of general reputation is permissible. Consequently, where a criminal defendant seeks to establish either his own good reputation relative to a particular trait or the violent tendencies or disposition of his victim, he may do so only by introducing evidence of general reputation.[225] Once the character of a defendant or victim is placed before the court, the prosecution may introduce evidence in rebuttal, but it too is limited to introducing evidence of general reputation.[226]

Although Mississippi courts follow the general rule that one cannot testify about the reputation of another without first establishing an acquaintance with the person in "the community in which he has lived,"[227] this rule has been interpreted broadly to include reputation in a former place of residence. If this were not so, one who had just changed his residence could not effectively or reliably prove his character, nor could the state determine or impeach a defendant's reputation.[228] Although the duration of separation from a former place of residence may affect the probative value of such evidence, the supreme court quite properly has no fixed rule for determining admissibility since a person's reputation is not easily changed.[229]

Evidence of specific acts or wrongs may be used in Mississippi to prove motive, intent, or knowledge since such evidence would not be a basis for inferring that one always acted in conformity with those acts. Evidence of specific acts is also admissible when character is an essential element of the charge or claim. For example, prior acts of inter-

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[225] *See* Rosser v. State, 230 Miss. 573, 577, 93 So. 2d 470, 471 (1957) ("Proof of good previous character of a defendant in a criminal prosecution is admissible as a matter of right . . . . [B]ut the evidence relating to such general reputation should be confined to the particular trait or traits involved in the nature of the charge against the defendant."); Newsome v. State, 197 Miss. 797, 802, 20 So. 2d 708, 708 (1945) (in murder trial, the dangerous character or propensity of the victim may not be proven by prior acts of violence committed by him); McCoy v. State, 91 Miss. 257, 263, 44 So. 814, 815 (1907) (defendant in murder trial may not show past acts of violence by deceased in addition to proof of his general reputation); King v. State, 65 Miss. 576, 582 (1888) (violent character of deceased must be proved by testimony of his general nature, not specific acts alone).

[226] *See* Herring v. State, 122 Miss. 647, 659, 84 So. 699, 704 (1920) (improper to admit evidence on rebuttal of particular misconduct or crimes in order to impeach defendant's reputation); Neal v. State, 101 Miss. 122, 129, 57 So. 419, 419 (1911) (improper to allow testimony concerning specific acts of defendant); Kearney v. State, 68 Miss. 233, 238, 8 So. 292, 293 (1890) (neither the accused nor the state can resort to particular facts to establish or refute the character thus put in issue).

[227] Brooks v. State, 242 So. 2d 865, 868 (Miss. 1971).

[228] Smith v. State, 182 Miss. 890, 897, 183 So. 699, 700 (1938); Lee v. State, 179 Miss. 122, 131, 174 So. 85, 87 (1937); Norwood & Butterfield Co. v. Andrews, 71 Miss. 641, 646, 16 So. 262, 263 (1893).

[229] Smith v. State, 182 Miss. 890, 898, 183 So. 699, 700 (1938).

course between the defendant and the prosecutrix in a rape case are admissible when consent is pleaded as a defense,[230] and in an unusual civil case involving breach of an alleged promise to marry,[231] the Mississippi Supreme Court approved the introduction of evidence of certain instances unknown to the defendant, which tended to establish the plaintiff's indiscretion and immodesty, but not unchastity, in mitigation of damages.[232] Additionally, testimony about specific acts may be used to test a character witness' accuracy and good faith, but not to impugn the defendant's character.[233] The prosecution is neither permitted nor required to substantiate the truth of specific instances, and it is likewise prohibited from referring to acts that occurred after the crime for which the defendant is charged.[234]

A comparison of rule 405 with Mississippi law reveals two primary differences regarding the methods by which character may be proved.[235] First, Mississippi does not permit character witnesses to give personal opinions absent knowledge of general reputation. Since the personal opinion of one who knows the defendant well, or has examined the defendant as an expert, is more reliable than what one has heard over the years, the position taken by rule 405 would appear to be the better view. The second distinction is the Mississippi Supreme Court's liberality in defining the community in which the defendant resides and in permitting evidence considerably prior in time to the event in question. In this respect, Mississippi has properly adopted the more flexible approach by permitting trial courts to determine these questions on a case-by-case basis.

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[230] Lewis v. State, 217 Miss. 488, 490-91, 64 So. 2d 634, 635 (1953). *But see* Rodgers v. State, 204 Miss. 891, 894-95, 36 So. 2d 155, 156 (1948) (excluding evidence of prior intercourse between the victim and men other than defendant).

[231] Carney v. McGilvray, 152 Miss. 87, 119 So. 157 (1928).

[232] *Id.* at 95-98, 119 So. at 160-61.

[233] Magee v. State, 198 Miss. 642, 646-47, 22 So. 2d 245, 246 (1945).

> While it is permissible on cross-examination, when testing the good faith and credibility of a character witness, to ask if he has not heard rumors or reports in the community of particular acts of violence imputed to the defendant which are inconsistent with the testimony then being given by the witness regarding the good reputation of the accused as to the particular trait of character inquired about . . . and to ask whether or not he had heard of specific charges of misconduct made against the defendant in the community . . . nevertheless, it is error to go into the details of the specific incidents to which the attention of the witness is directed and on which the rumors or complaints may have been based, with a view of establishing the details of the alleged misconduct as a fact instead of as a matter of reputation.

Id. at 646, 22 So. 2d at 246. *See also* Smith v. State, 112 Miss. 802, 73 So. 793 (1916).

[234] White v. State, 290 So. 2d 616, 618 (Miss. 1974).

[235] *Compare* FED. R. EVID. 405 *with* notes 223 & 229 *supra.*

RULE 406. HABIT; ROUTINE PRACTICE[236]

Rule 406 adopts the accepted view that allows evidence to prove a person acted in conformity with a particular habit or practice.[237] Although not defined in the rule, a habit is generally considered to be repeated performances under similar conditions.[238] Indeed, prior case law indicates the instances alleged as evidencing habit must be numerous[239] and consistent.[240]

The primary reason for accepting such evidence is the belief that it

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[236] FED. R. EVID. 406 provides:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

See Evidence ⚿ 129-42.

[237] McCormick describes evidence of habit as "the person's regular practice of meeting a particular kind of situation with a specific type of conduct." C. MCCORMICK, *supra* note 3, § 195, at 462. *See also* Frase v. Henry, 444 F.2d 1228, 1232 (10th Cir. 1971) (distinguishing character from habit); Hambrice v. F.W. Woolworth Co., 290 F.2d 557, 559 (5th Cir. 1961) (allowing evidence of habit or custom prior to the federal rules); Cereste v. New York, N.H. & H.R.R., 231 F.2d 50, 53-55 (2d Cir.) (adopting the admission of evidence of habit in negligence cases to show dangerous condition), *cert. denied*, 351 U.S. 951 (1956). Several courts, however, have applied evidence of custom or habit throughout an industry, though this is not within the scope of rule 406. *See* Eggert v. Norfolk & W. Ry., 538 F.2d 509, 512 (2d Cir. 1976) (practice of other railroads with respect to routine method of handling shipments should have been admitted to show improper handling of product); Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178, 1180 (5th Cir. 1975) (FAA advisory materials admitted as bearing on the standard of care in determining negligence); Rodriquez v. Delray Connecting R.R., 473 F.2d 819, 821 (6th Cir. 1973) (evidence of similar safety equipment used by other railroads); Tropea v. Shell Oil Co., 307 F.2d 757, 763 (2d Cir. 1962) (general practice in particular trade relevant to prove that one following such practice exercises due care). *But cf.* Doss v. Apache Powder Co., 430 F.2d 1317, 1322-23 (5th Cir. 1970) (custom employed thousands of miles away was irrelevant).

[238] FED. R. EVID. 405, Advisory Comm. Notes.

[239] *See, e.g.*, Utility Control Corp. v. Prince William Constr. Co., 558 F.2d 716, 721 (4th Cir. 1977) (claim that treasurer of corporation guaranteed contractual performance in previous contract with another did not constitute habit); Straus v. Douglas Aircraft Co., 404 F.2d 1152, 1158 (2d Cir. 1968) ("[S]pecific examples of other negligent repairs might conceivably be relevant to show a party's habit or custom to abuse, but such occurrences must be 'numerous enough to base an inference of systematic condition' ").

[240] *See, e.g.*, Frase v. Henry, 444 F.2d 1228, 1232 (10th Cir. 1971) (testimony about good driving qualities admitted where it showed practice of driving under speed limit with regard to the rules of the road and where the evidence showed specific instances of driver's propensity to be careful rather than a mere general disposition to drive carefully); Handley v. B. & O.R.R., 120 F.2d 993, 995 (3d Cir. 1941) (court admitted proof by the defendant of plaintiff's habitual tendency to fall down when drunk and remain there); Howard v. Capital Transit Co., 97 F. Supp. 578, 579 (D.D.C. 1951) (decedent's habit of using defendant's buses to return from work admissible to show he was passenger on bus on night in question), *aff'd*, 196 F.2d 593 (D.C. Cir. 1952).

has more probative value than character evidence,[241] though the line between the two cannot be precisely drawn. The primary problem is resolving the question of how frequently or consistently a specific type of conduct must reoccur to reach the status of habit.[242] Since no precise standard exists, admissibility depends on the court's evaluation of the facts in each particular case.[243] Rule 406 should make the admission of habit evidence more common because it provides for the admission of habit evidence despite the presence of eyewitnesses.[244]

Although the courts have often been reluctant to admit evidence of habit, they have been willing to admit evidence of the routine practice of business. This is probably due to the assumption that businesses are likely to operate in a specific customary manner necessitated by planning and efficiency,[245] which by virtue of rule 406 need not be corroborated.[246] Accordingly, evidence of the usual or fixed course of dealings between two parties is admissible,[247] and in some situations, courts have admitted evidence of business transactions between one of the parties and a third party to prove a similar transaction had previously occurred.[248]

When the admissibility of habit or routine practice evidence has been determined, the question regarding the method of proof must be resolved. The proof may be in the form of either an opinion or cumulative specific instances of conduct. But the choice ultimately lies within the trial judge's discretion, subject to rule 403 dictates against prejudice, confusion, misleading the jury or undue waste of time.[249]

Evidence of habit and custom is admissible in Mississippi, but "its relevancy and probative value must be clearly shown."[250] Whether the

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[241] FED. R. EVID. 406, Advisory Comm. Notes.

[242] *Id.*

[243] In addition to the requirement of frequency, for a habit or custom to be relevant, it must refer to the general locality in question. Doss v. Apache Powder Co., 430 F.2d 1317, 1322-23 (5th Cir. 1970).

[244] *See* FED. R. EVID. 406, Advisory Comm. Notes ("The rule also rejects the requirement of the absence of eye witnesses sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases."). *See also* C. MCCORMICK, *supra* note 3, § 195, at 463 n.14.

[245] 2 WEINSTEIN'S EVIDENCE ¶ 406[03], at 406-14 (1976). *See generally* United States v. Oddo, 314 F.2d 115, 117 (2d Cir.), *cert. denied*, 375 U.S. 833 (1963); Crude Oil Corp. of America v. IRS, 161 F.2d 809, 810 (10th Cir. 1947).

[246] 2 WEINSTEIN'S EVIDENCE ¶ 406[03], at 406-15 (1976).

[247] 1 J. WIGMORE, *supra* note 4, § 94, at 523.

[248] *See, e.g.*, Joseph v. Krull Wholesale Drug Co., 147 F. Supp. 250, 251 (E.D. Pa. (1956) (admitted evidence of defendant's contracts with third persons), *aff'd*, 245 F.2d 231 (3d Cir. 1957); 2 WEINSTEIN'S EVIDENCE ¶ 406[03], at 406-17 (1976).

[249] *See* Strauss v. Douglas Aircraft Co., 404 F.2d 1152 (2d Cir. 1968); FED. R. EVID. 403, Advisory Comm. Notes; 2 WEINSTEIN'S EVIDENCE ¶ 406[04], at 406-18 (1976).

[250] Robinson v. Turfitt, 192 Miss. 160, 164, 4 So. 2d 884, 885 (1947); *accord*, Montgo-

eyewitness rule is applicable, however, is a question thus far unanswered.[251] Mississippi courts will not take judicial notice of a local custom,[252] but community customs and standards may be proved by opinion[253] or evidence of a series of specific instances.[254] The burden of proving custom and usage lies with the party seeking to use the evidence,[255] and moreover, the Mississippi Supreme Court has said that such evidence "never prevails unless it is uniform, reasonable, and not contrary to law."[256]

Evidence of custom is very limited in tort cases,[257] primarily because of the fear of establishing a standard of care that may become unreasonable as times and circumstances change.[258] Consequently, the supreme court has warned against attempts to use custom as a standard of care. "Evidence of custom and usage . . . is not the ultimate test of negligence, but is admissible solely for the purpose of assisting the jury, along with other evidence, in determining whether the conduct of a party was that of a reasonably prudent man."[259] When custom or habit is established by evidence of other specific prior instances of conduct, the rule may be further limited by the principle that prior acts of negli-

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mery v. Kimbrough Homes, Inc., 214 Miss. 519, 526, 59 So. 2d 273, 275 (1952) (contractor's habit of ignoring certain costs in his estimations when bidding for construction contracts was admitted yet insufficient to overturn the express language of the bid contract); Bank of Forest v. Capital Nat'l Bank, 173 Miss. 99, 104-05, 160 So. 578, 580 (1935) (evidence of prior transactions between two banks admissible but insufficient); *see generally* S.H. Kress & Co. v. Markline, 117 Miss. 37, 47-51, 77 So. 858, 862-63 (1917).

[251] *See, e.g.*, Alabama & V. Ry. v. Aetna Ins. Co., 82 Miss. 770, 781-82, 35 So. 304, 306 (1903) (habit of trains causing sparks admissible in absence of eyewitness to origin of fire in question); T. McELROY, MISSISSIPPI EVIDENCE § 33, at 147 (1955) ("Evidence of habit . . . may, where the evidence is conflicting, be admitted to prove that [one] acted in accordance with it on a given occasion . . . . In cases where direct evidence is or can be produced, evidence of habit is rejected.").

[252] Dowling v. Smyley, 150 Miss. 272, 286, 116 So. 294, 295 (1928).

[253] *See, e.g.*, Catholic Diocese of Natchez-Jackson v. Jaquith, 224 So. 2d 216, 220, 222 (Miss. 1969) (practice of padding walls in gymnasiums around the state shown by education association books and pamphlets); Smith v. Farmers Ginning Ass'n, 201 Miss. 573, 578, 29 So. 2d 663, 664 (1947) (witness required to testify to the customary practices of the particular locality).

[254] Bank of Forest v. Capital Nat'l Bank, 173 Miss. 99, 104-05, 160 So. 578, 580 (1935).

[255] *See, e.g.*, Dowling v. Smyley, 150 Miss. 272, 286, 116 So. 294, 294 (1928) (because contract did not specify a term, had local custom been proved, it would have applied).

[256] Rosenblatt v. Escher, 184 Miss. 274, 282, 185 So. 551, 551 (1939); *accord,* Magnolia Lumber Corp. v. Czerwiec Lumber Co., 207 Miss. 738, 747, 43 So. 2d 204, 206 (1949); Eagle Cotton Oil Co. v. Sollie, 185 Miss. 475, 487, 187 So. 506, 508 (1939); Newell Contracting Co. v. Flynt, 172 Miss. 719, 727, 161 So. 298, 300 (1935); Fireman's Fund Ins. Co. v. Williams, 170 Miss. 199, 210, 154 So. 545, 547 (1934).

[257] Meridian Star v. Kay, 211 Miss. 536, 544, 52 So. 2d 35, 38 (1951).

[258] Catholic Diocese of Natchez-Jackson v. Jaquith, 224 So. 2d 216, 222 (Miss. 1969).

[259] *Id.*

gence are inadmissible to prove negligence on a given subsequent occasion.[260] Evidence of habit and custom are, however, considered probative, though not determinative, on the issue of reasonable care.[261]

In contract cases, evidence of custom or trade usage is characterized by clearer rules than those for tort actions, probably because contract cases primarily involve the certainty attached to business dealings.[262] To be binding in business transactions, custom and usage

> must be shown to have prevailed in the particular locality or generally in relation to the subject-matter of [the parties'] dealings, and that, therefore, they intended and understood that such custom should be the law of their actions. The custom or usage must be known to them either in fact or by implication.[263]

Consequently, the party against whom the custom is asserted must know of it. Actual notice is required where the custom is local in nature,[264] although notice is presumed where the custom is general and a matter of common knowledge.[265] A custom may not be established by the mere frequency of an act;[266] rather, it must be shown that the custom is so well known a fair presumption arises that the parties entered into their dealings with a silent reference to it and a corresponding tacit agreement that their rights and duties would be determined by it.[267]

Finally, custom and usage cannot create a contract or establish a liability where none otherwise exists.[268] Neither can custom and usage change the law or contradict the express terms of a contract, although ambiguous contracts can be clarified by custom and usage.[269] Evidence

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[260] Yazoo & M.V.R.R. v. Pittman, 169 Miss. 667, 675, 153 So. 382, 384-85 (1934); Tribette v. Illinois Cent. R.R., 71 Miss. 212, 233, 13 So. 899, 902 (1893).

[261] *See* Catholic Diocese of Natchez-Jackson v. Jaquith, 244 So. 2d 216, 222 (Miss. 1969) (statewide custom of school gymnasium design admitted in child's wrongful death action); Eagle Cotton Oil Co. v. Sallie, 185 Miss. 475, 487, 187 So. 506, 508 (1939) (evidence of custom among employers of providing safe working conditions); New Orleans & N.E.R.R. v. James, 157 Miss. 607, 613, 128 So. 766, 768 (1930) (citywide local railroad custom); Southern Ry. v. McLellan, 80 Miss. 700, 708, 32 So. 283, 284 (1902) (evidence of other companies using same type material).

[262] See note 245 and accompanying text *supra.*

[263] Germany v. United States Fidelity & Guar. Co., 168 Miss. 854, 862-63, 152 So. 275, 277 (1933).

[264] *Cf.* Burbridge v. Gumbel, 72 Miss. 371, 377-79, 16 So. 792, 793 (1895) (generally recognized custom carries a presumption of validity).

[265] *Id. See also* Germany v. United States Fidelity & Guar. Co., 168 Miss. 854, 862-63, 152 So. 275, 277 (1933).

[266] Natchez Ins. Co. v. Stanton, 10 Miss. 340, 382 (1844).

[267] *Id.*

[268] Magnolia Lumber Corp. v. Czerwiec Lumber Co., 207 Miss. 738, 747, 43 So. 2d 204, 206 (1949).

[269] *See* Magnolia Lumber Corp. v. Czerwiec Lumber Co., 207 Miss. 738, 747, 43 So.

of prior transactions is likewise relevant to establish a subsequent contract in fact was made,[270] was part of a general course of dealing,[271] or was executed with a certain intention.[272]

RULE 407. SUBSEQUENT REMEDIAL MEASURES[273]

Evidence of remedial measures, repairs, modifications, or other changes in conditions made subsequent to an accident is uniformly excluded in almost all American jurisdictions when it is sought to be admitted to prove negligence or culpable conduct.[274] Rule 407 adopts this principle as well as the most commonly recognized exceptions.[275]

The doctrine of exclusion has found support on two grounds, irrelevancy and the policy of encouraging safety precautions.[276] It has long been advanced that irrelevancy is the primary reason for the policy since neither precautions nor repairs constitutes an admission of responsibility for what has previously occurred.[277] Furthermore, to admit evidence of subsequent changes would discourage people from taking remedial

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2d 204, 206 (1949) (custom of several prior agreements would not overturn a clear contract); Fireman's Fund Ins. Co. v. Williams, 170 Miss. 199, 210-11, 154 So. 545, 547 (1934) (custom evidence would not change oral agreement for insurance renewal although admissible for construing contract); D.S. Pate Lumber Co. v. Weather, 167 Miss. 228, 243-44, 146 So. 433, 437 (1933) (custom and usage of broker's commission would not contradict written agreement); Postal Tel. Co. v. Willis, 93 Miss. 540, 551-52, 47 So. 380, 381 (1908) (custom inadmissible to vary clear, unambiguous agreement).

[270] Owen v. Sumrall, 204 Miss. 15, 30, 36 So. 2d 802, 802-03 (1948).

[271] Sample v. Romine, 193 Miss. 706, 731-32, 8 So. 2d 257, 263 (1942).

[272] Witherspoon v. Campbell, 219 Miss. 640, 652, 69 So. 2d 384, 389 (1954).

[273] FED. R. EVID. 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

See Automobiles ⚿ 305(7); Electricity ⚿ 19(4); Master & Servant ⚿ 270 (7); Negligence ⚿ 130-31; Railroads ⚿ 347(5).

[274] Columbia & P.S.R.R. v. Hawthorne, 144 U.S. 202, 207 (1892); General Motors Corp. v. Holler, 150 F.2d 297, 300 (8th Cir. 1945); *see* SEC v. Geon Indus., Inc., 531 F.2d 39, 52 (2d Cir. 1976) (following the rule).

[275] FED. R. EVID. 407, Advisory Comm. Notes.

[276] 2 WEINSTEIN'S EVIDENCE ¶ 407[02], at 407-7 to -12 (1976).

[277] Columbia & P.S.R.R. v. Hawthorne, 144 U.S. 202, 207 (1892).

> [T]he evidence is incompetent, because the taking of such precaution against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant.

Id.

action.[278] These rationales are not universally accepted, however, and some commentators doubt the validity of the arguments and the usefulness of the rule.[279] Criticism also arises from the realization that evidence of subsequent remedial measures is usually admitted under one of several exceptions, thereby rendering the rule practically useless.[280]

Even though evidence of remedial measures is inadmissible to prove negligence, it may be admissible to prove other material facts at issue.[281] The first illustration of this broad exception is evidence offered to prove control or ownership.[282] Rule 407 also excepts evidence of remedial corrections offered to show the feasibility of taking precautionary measures.[283] If the defendant is the party that first introduces evidence that precautions were not possible, the defendant cannot complain when the plaintiff is allowed to disprove the defense.[284] If the defendant does not raise the issue, however, precautionary measures may be excluded as

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[278] *E.g.*, Kovacs v. Sun Valley Co., 499 F.2d 1105, 1106 (9th Cir. 1974); Louisville & Nash. R.R. v. Williams, 370 F.2d 839, 844 (5th Cir. 1966); Vockie v. General Motors Corp., 66 F.R.D. 57, 61 (E.D. Pa.), *aff'd*, 523 F.2d 1052 (3d Cir. 1975).

[279] 2 WEINSTEIN'S EVIDENCE ¶ 407[02], at 407-9 to -12 (1976).

> Nevertheless, Rule 407 has only a marginal justification. Its underlying assumption is that a person will not take remedial measures because his corrective actions might be used in evidence at a future trial. Such an assumption seems absurd. Not every defendant will be aware of the possibility that subsequent remedial measures might constitute an admission. Of those who would know of the rule, any responsible insured defendant will not be likely to refrain deliberately from taking action to prevent the recurrence of subsequent serious injuries. In any subsequent case, evidence of the earlier accident would be admissible to show that defendant knew of a dangerous condition. . . . Rule 407 could have been eliminated with no great loss.

Id. at 407-9 to -10.

[280] Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 412 (1952).

> Is it not true that to allow exceptions to a policy of absolute exclusion is to destroy the policy itself? Can one safely advise his clients to proceed with repair or improvement after injury? . . . Is it preferable to broaden the area of absolute exclusion or to abolish it and place the problem of admissibility entirely within the area of trial judge discretion?

Id.

[281] FED. R. EVID. 407, Advisory Comm. Notes.

[282] *E.g.*, Woolard v. Mobil Pipe Line Co., 479 F.2d 557, 563 (5th Cir.), *cert. denied*, 414 U.S. 1025 (1973); Wallner v. Kitchens of Sara Lee, Inc., 419 F.2d 1028, 1032 (7th Cir. 1969); Powers v. J.B. Michael & Co., 329 F.2d 674, 677 (6th Cir. 1964).

[283] Lolie v. Ohio Brass Co., 502 F.2d 741, 744 (7th Cir. 1974); Boeing Airplane Co. v. Brown, 291 F.2d 310, 315 (9th Cir. 1961); Nice v. Chesapeake & O.R.R., 305 F. Supp. 1167, 1178 (W.D. Mich. 1969).

[284] *See, e.g.*, Davis v. Fox River Tractor Co., 518 F.2d 481, 485-86 (10th Cir. 1975) (where defendant testified that a safety device would render machine useless, it was proper to show that such device was added after accident).

proof of negligence since the issues are closely related.[285] Rule 403[286] should therefore be considered as excluding such evidence, especially in a jury trial, on the grounds of undue prejudice.[287]

Evidence of repairs is also admissible as rebuttal when the defendant attempts to prove that no danger existed at the time of the accident by introducing evidence of the instrumentality's condition after the repairs were made.[288] Moreover, such evidence has been admitted in other cases merely to show the condition at the time of the occurrence.[289] Consequently, this exception often approaches a subterfuge to circumvent the rule and should be allowed sparingly and cautiously.[290]

Some courts have admitted evidence of remedial measures as proof of the duty element of negligence.[291] But, since neither rule 407 nor the Advisory Committee's note mentions this exception, some commentators have questioned its applicability under the Federal Rules of Evidence.[292]

The various exceptions outlined above are applicable only if the subject of the exception is at issue[293] since evidence of subsequent repairs is not permitted to prove points not controverted. Once the defendant raises the issue, however, such evidence is permitted under both the common law and rule 407.[294] Nevertheless, care should be taken to ensure that the impeachment exception is not used as a mere stratagem

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[285] *See* Boeing Airplane Co. v. Brown, 291 F.2d 310, 315 n.3 (9th Cir. 1961) (in a jury trial, the trial court in its discretion may exclude evidence of subsequent changes even when it is offered to show feasibility if court feels the jury may improperly infer negligence).

[286] FED. R. EVID. 403.

[287] Northwest Airlines, Inc. v. Glenn L. Martin Co., 224 F.2d 120, 130 (6th Cir. 1955), *cert. denied,* 350 U.S. 937 (1956).

[288] Choctaw O. & G.R.R. v. McDade, 191 U.S. 64, 69 (1903); Henwood v. Chaney, 156 F.2d 392, 396 (8th Cir.), *cert. denied,* 329 U.S. 760 (1946); 2 WEINSTEIN'S EVIDENCE ¶ 407[03], at 407-17 to -18 (1976); *cf.* Tyler v. Dowell, Inc., 274 F.2d 890, 898-99 (10th Cir.) (evidence of subsequent repairs admissible to attack credibility of defense witness who testified to infeasibility of change), *cert. denied,* 363 U.S. 812 (1960).

[289] O'Brien v. Las Vegas & T.R.R., 242 F. 850, 852-53 (9th Cir. 1917).

[290] *See* Bailey v. Kawasaki-Kisen, K.K., 455 F.2d 392, 395-96 (5th Cir. 1972) (admonition to the jury is needed when such evidence is admitted); 2 WEINSTEIN'S EVIDENCE ¶ 407[03], at 407-16 to -17 (1976).

[291] *See* Carstens Packing Co. v. Swinney, 186 F. 50, 52 (9th Cir. 1911) (evidence that defendant covered vats including the one in which the plaintiff had fallen was admitted to show defendant's duty).

[292] *See* 2 WEINSTEIN'S EVIDENCE ¶ 407[03], at 407-19 to -20 (1976).

[293] *See, e.g.,* Smith v. Upjohn Co., 529 F.2d 803, 805 (2d Cir. 1975) (postaccident warnings by a drug manufacturer excluded as being irrelevant to the manufacturer's ability to write a stronger warning since such was not an issue in the case).

[294] 2 WEINSTEIN'S EVIDENCE ¶ 407[04], at 407-20 (1976); *see* Polk v. Ford Motor Co., 529 F.2d 259, 270-71 (8th Cir. 1976) (within court's discretion to allow such evidence).

to circumvent the rule.[295] The broad discretion vested in the trial judge should ensure remedial evidence is not introduced for improper purposes.[296]

Although Mississippi at one time allowed the use of evidence of subsequent repairs to establish negligence,[297] this early rule was repudiated in *Standard Oil Co. v. Franks*[298] on public policy grounds.[299] The two exceptions since adopted by the Mississippi Supreme Court allow the introduction of repair evidence when the defendant testifies that changes are not feasible,[300] or when evidence of conditions after the change is offered as proof of the condition at the time of the accident.[301] Although many of the federal exceptions have not as yet been considered in Mississippi, the supreme court will probably recognize them in the future, since the present decisions accord with both the policy and substance of rule 407.

Rule 408. Compromise and Offers to Compromise[302]

Federal courts will not allow evidence of compromises or offers of

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[295] 2 Weinstein's Evidence ¶ 407[04], at 407-21 (1976).

[296] *See* Bailey v. Kawasaki-Kisen, K.K., 455 F.2d 392, 396 (5th Cir. 1972) (dictum) (jury should be instructed as to the purpose of the evidence); Tyler v. Dowell, Inc., 274 F.2d 890, 898-99 (10th Cir.) (it is within trial court's discretion to admit such evidence for impeachment), *cert. denied,* 363 U.S. 812 (1960). *But see* Stephens v. Consolidated Mut. Ins. Co., 352 F.2d 41, 44 (1st Cir. 1965) (new trial ordered because of improper use of impeachment to elicit evidence of subsequent remedial measures).

[297] *See* Sea Food Co. v. Alves, 117 Miss. 1, 8-9, 77 So. 857, 858 (1918) (subsequent repair of dangerous apparatus is not an admission of negligence, but may be considered on question of negligence in failing to erect protective guard).

[298] 167 Miss. 282, 149 So. 798 (1933).

[299] *Id.* at 287-88, 149 So. at 799 (it is public policy to encourage repair and people should not be deterred by fear that such action will be admissible against them); *accord,* Catholic Diocese of Natchez-Jackson v. Jaquith, 224 So. 2d 216, 224 (Miss. 1969); Chicago Mill & Lumber Co. v. Carter, 209 Miss. 71, 78, 45 So. 2d 854, 855 (1950).

[300] Chicago Mill & Lumber Co. v. Carter, 209 Miss. 71, 78, 45 So. 2d 854, 855 (1950) (dictum) (defendant alleged that guards or other protective devices were not employed because they would interfere with safe and successful operation of the apparatus).

[301] Standard Oil Co. v. Franks, 167 Miss. 282, 287-88, 149 So. 798, 799 (1933) (dictum) (defendant introduced photographs taken after repairs were made).

[302] Fed. R. Evid. 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a

compromises to be admitted to prove that a claim is either valid or invalid.[303] This policy has been adopted by rule 408 and further extended to prohibit the introduction of "evidence of conduct and statements made in compromise negotiations,"[304] which would seem to be a necessary adjunct to the general principle. Otherwise, open and candid discussions of settlement are bound to be inhibited since any of the statements made during the negotiations could be used as a sword by the opposition at the trial.[305] The effect this change will have is largely unknown because the determination of whether a statement was made in the course of settlement negotiations is sometimes difficult.[306] A restrictive interpretation of the change, however, would defeat the rule's purpose. In any event, the question should be decided by the judge, not by the jury.[307]

Several reasons have been advanced as the basis for the principle embodied in rule 408. The rule is most commonly justified in the United States on the grounds that it helps reduce both case loads and administrative expenses.[308] Yet, the legal relevancy theory has been advanced by Professor Wigmore as the real reason for excluding evidence of settle-

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witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

See Criminal Law ⇐ 408; Evidence ⇐ 213, 219.

[303] FED. R. EVID. 408, Advisory Comm. Notes; 2 WEINSTEIN'S EVIDENCE ¶ 408[01], at 408-10 (1976).

[304] FED. R. EVID. 408.

[305] Comment, *Admissibility of Statements of Fact Made During Negotiation for Compromise*, 34 MICH. L. REV. 524, 529 (1936). One court recently admitted evidence of a compromise and offers to compromise at a grand jury hearing. *In re* Special November 1975 Grand Jury, 433 F. Supp. 1094, 1096-97 (N.D. Ill. 1977). "It is my belief that the overriding consideration here is society's need to uncover matters which may relate to potential criminal acts. The Grand Jury simply cannot afford to be hamstrung in its essential functions by overly fine distinctions as those attempted by the movants here." *Id.* at 1097 n.2. Evidence otherwise discoverable under the Federal Rules of Civil or Criminal Procedure is not affected, even though made during settlement negotiations. Furthermore, attempts to "buy off" the prosecution or the complaining witness are specifically excluded and therefore admissible as an attempt to obstruct criminal justice. FED. R. EVID. 408, Advisory Comm. Note. Rule 408 does not affect the provisions of rule 410 concerning "plea bargaining."

[306] 2 WEINSTEIN'S EVIDENCE ¶ 408[03], at 408-21 to -22 (1976).

[307] United States v. Heyward-Robinson Co., 430 F.2d 1077, 1083 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); *cf.* Phoenix Assurance Co. v. Davis, 67 F.2d 824, 825 (5th Cir. 1933) (question of whether to admit the compromise into evidence was properly submitted to jury to resolve the preliminary question of fact as to whether it was a compromise).

[308] *See, e.g.*, Reichenbach v. Smith, 528 F.2d 1072, 1073 (5th Cir. 1976) ("With today's burgeoning dockets and the absolute impossibility of Courts ever beginning to think that they might even be able to hear every case, the cause of justice is advanced by settlement compromises.").

ment negotiations because an offer of compromise "does not ordinarily proceed from and imply a specific belief that the adversary's claim is well founded."[309] "In short, the offer implies merely a desire for peace, not a concession of wrong done . . . ."[310] English authorities, followed by only a few early American courts, base this rule on contract.[311]

If offers of compromise are to be excluded, the same principle would require that accepted offers of compromise be granted similar protection. Although this view was not accepted prior to the enactment of rule 408,[312] the old principle is correctly denounced and the rule excludes evidence of a performed compromise to prove the validity or amount of the claim.[313] If acceptance of the compromise results in an agreement that is later breached by the accepting party, evidence to that effect is admissible as in any suit based on the contract.[314] In short, if the acceptance of the offer does not result in settlement, the other party may not offer the acceptance as proof of the validity of the original claim. Neither may evidence of a completed compromise be used by a third person asserting a cause of action arising out of the same transaction,[315] although if neither litigant was party to the compromise, it would be admissible if otherwise relevant.[316]

Rule 408 sets forth two explicit exceptions. First, evidence of compromise may be used to prove a material or consequential fact at issue other than the issue of the validity or amount of a claim.[317] Examples of this exception include evidence that negates a contention of lack of diligence,[318] evidence that shows a claim was subsequently acknowledged by the debtor to avoid the statute of frauds,[319] or evidence that explains another dispute arising out of settlement negotiations.[320] Courts should be careful, however, to prevent such evidence from being used to establish the validity or amount of a claim.[321] Second, proof of settle-

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[309] 4 J. WIGMORE, *supra* note 4, § 1061, at 36.

[310] *Id.*

[311] *Id.* at 27.

[312] 31A C.J.S. *Evidence* § 290 (1964).

[313] Shipley v. Pittsburgh & L.E.R.R., 83 F. Supp. 722, 762 (W.D. Pa. 1949).

[314] 2 WEINSTEIN'S EVIDENCE ¶ 408[04], at 408-23 (1976).

[315] United States v. 46,672.96 Acres of Land, 521 F.2d 13, 17 (10th Cir. 1975); Sun Oil Co. v. Govostes, 474 F.2d 1048, 1049 (2d Cir. 1973).

[316] Huntley v. Snider, 86 F.2d 539, 540 (1st Cir. 1936).

[317] FED. R. EVID. 408, Advisory Comm. Notes.

[318] 2 WEINSTEIN'S EVIDENCE ¶ 408[05], at 408-28 (1976).

[319] *Id.*

[320] *Id.*

[321] *See* National Battery Co. v. Levy, 126 F.2d 33, 36-37 (8th Cir.) (the fact that owner of car had settled with one victim in accident should not be admitted in another suit arising out of same accident when other proof clearly proved the point in issue), *cert. denied*, 316 U.S. 697 (1942).

ment is permitted when it concerns a witness' bias or prejudice. This occurs most frequently when the witness has settled his claim against one of the parties to the action being tried. In allowing cross-examination of such a witness about the settlement, rule 408 suggests that determination of the witness' credibility is more important than the policy excluding evidence of compromises.[322] Rule 408 in no way conflicts with rule 68 of the Federal Rules of Civil Procedure, which makes inadmissible unaccepted offers of judgment served in conformity with rule 5(b) after commencement of the action and not within ten days before trial. The evidentiary rule is much broader in scope than the procedural.[323]

Offers and compromises are inadmissible in Mississippi.[324] This exclusion has been applied in actions involving contracts,[325] torts,[326] property,[327] and workmen's compensation.[328] Whether the settlement was made between a party to an action and a third person is immaterial, "even though it relates to the matters involved in the action and the person with whom the compromise was made was in the same position as the party seeking to show such settlement."[329] For example, the third party rule is clearly illustrated in eminent domain actions when an attempt is made to establish the amount of damages by testimony concerning sums paid by the condemnor in similar negotiations.[330]

Although Mississippi follows a general rule of exclusion, two significant exceptions have been recognized. Statements of fact made during

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[322] *See* Reichenbach v. Smith, 528 F.2d 1072, 1076 (5th Cir. 1976) (holding that trial judge did not abuse his discretion in refusing to permit cross-examination of plaintiff about settlement with codefendant under the circumstances, but noted that the better rule and the one which would be followed in future was that as codified in rule 408).

[323] 2 WEINSTEIN'S EVIDENCE ¶ 408[07], at 408-32 to -33 (1976).

[324] *See* Aaronson v. McGowan, 181 Miss. 642, 651, 180 So. 738, 740 (1938) (action on note); Shell Petroleum Corp. v. Eagle Lumber & Supply Co., 171 Miss. 539, 547, 158 So. 331, 333 (1934) (action on contract); Atlantic Life Ins. Co. v. Serio, 171 Miss. 726, 732, 157 So. 474, 476 (1934) (action on insurance policy); Houston v. Keith, 100 Miss. 83, 90, 56 So. 336, 337 (1911) (action on promissory note); Dufour v. Chapotel, 75 Miss. 656, 659-60, 23 So. 387, 388 (1898) (action on open account). *See also* MISS. CODE ANN. § 11-7-113 (1972) (in certain cases, defendant may tender into court a sum of money as compensation or amends to plaintiff; if tender is not accepted, it is deemed withdrawn and not admissible in evidence).

[325] Shell Petroleum Corp. v. Eagle Lumber & Supply Co., 171 Miss. 539, 547, 158 So. 331, 333 (1934); Atlantic Life Ins. Co. v. Serio, 171 Miss. 726, 732, 157 So. 474, 476 (1934).

[326] Alexander Pool Co. v. Pevey, 247 Miss. 389, 396, 152 So. 2d 451, 454 (1963).

[327] Barber v. Great S. Dev. Co., 249 Miss. 662, 669, 163 So. 2d 735, 737 (1964).

[328] Luther McGill, Inc. v. Cook, 306 So. 2d 304, 307 (Miss. 1975).

[329] Alexander Pool Co. v. Pevey, 247 Miss. 389, 394, 152 So. 2d 451, 454 (1963).

[330] *See* Mississippi State Highway Comm'n v. Ladner, 243 Miss. 278, 287, 137 So. 2d 781, 784 (1962); Dantzler v. Mississippi State Highway Comm'n, 190 Miss. 137, 150-51, 199 So. 367, 371 (1941).

the negotiation process may be used as admissions against the declarant,[331] although determining whether a compromise has actually been made or suggested,[332] or whether a given statement is an admission of fact,[333] may be difficult. The second major exception applies in criminal cases and, in certain situations, permits evidence of attempted compromises between the defendant and prosecuting witness.[334] To be admissible, the offer to settle must have been made directly by the defendant or his agent[335] and must have been voluntary.[336] This exception has been extended to at least one civil case arising out of an automobile collision. The Mississippi Supreme Court approved the admission of evidence regarding the payment of insurance benefits to and release of claims by the plaintiff who had alleged that the defendant had partially paid the damages claimed. The allegation, if not rebutted, might have led to an inference that the defendant admitted liability, and it was thus proper to show the nature of the prior settlement.[337]

It is submitted that Mississippi would recognize the other exceptions discussed in connection with rule 408, especially since the "admission of fact" rule is already followed.[338] Furthermore, even though an early Mississippi case held that whether a certain statement was an offer to compromise or an admission of fact was a question for the jury,[339] it is probable that this ancient holding would not be followed by the present court since the question is more properly confined to the province of the trial judge.[340]

The most significant variance between the provisions of rule 408 and state practice is found in the Mississippi Supreme Court's approval of the admission of evidence concerning "conduct and statements made

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[331] *See* McNeer & Dodd v. Norfleet, 113 Miss. 611, 630-31, 74 So. 577, 579 (1917) (proper to admit statements of defendant as to the size of leased property where it is in dispute); Garner v. Myrick, 30 Miss. 448, 452 (1855) (admission that defendant was partner in firm admissible in suit against the firm); *cf.* Prussel v. Knowles, 5 Miss. (4 Howard) 90, 94-95 (1839) (jury must decide whether the statement is an admission or compromise).

[332] *See, e.g.,* Johnstone v. Johnson, 248 So. 2d 444, 450 (Miss. 1971) (letter from defendant that he owned interest in home was admissible).

[333] *See, e.g.,* Prussell v. Knowles, 5 Miss. (4 Howard) 90, 94 (1839) (controversy over whether letter was a "peace offering" or an admission of fact).

[334] Turner v. State, 176 Miss. 862, 865, 170 So. 642, 642 (1936).

[335] Ware v. State, 204 Miss. 107, 111, 37 So. 2d 18, 18 (1948); *see* Jones v. State, 180 Miss. 210, 222, 177 So. 35, 38 (1937) (offer by codefendant inadmissible).

[336] Turner v. State, 176 Miss. 862, 866, 170 So. 642, 642 (1936); Bridges v. State, 86 Miss. 377, 379, 38 So. 679, 679 (1905).

[337] Ginn v. Culpepper, 243 Miss. 55, 57, 137 So. 2d 179, 180 (1962).

[338] See note 331 and accompanying text *supra.*

[339] Prussel v. Knowles, 5 Miss. (4 Howard) 90, 94-95 (1839).

[340] United States v. Heyward-Robinson Co., 430 F.2d 1077, 1082-83 (2d Cir. 1970).

during compromise negotiations."[341] In this respect, it appears that Mississippi has adopted an unduly restrictive approach that inhibits free and frank discussion of settlement. Consequently, the federal concept prohibiting evidence of conduct and statements made during settlement negotiations seems to be the better choice.

RULE 409. PAYMENT OF MEDICAL AND SIMILAR EXPENSES[342]

Following the basic principle underlying rules 407 and 408, most American jurisdictions exclude evidence of the furnishing, offering, or promising to pay medical and hospital bills to prove liability for an injury.[343] The reason for this exclusion is the belief that such offers spring from human impulses rather than feelings of guilt or culpable conduct.[344] However, a better basis for this doctrine is found in the social policy that encourages assistance to an injured person by negating the risk that the assistance will later be used at trial to establish liability.[345] Because of this reasoning, rule 409 was adopted with little opposition.[346]

Notwithstanding the dictates of the *Erie* doctrine,[347] rule 409[348] should be applied by the federal courts even when contrary to state law for reasons of uniformity. Although some courts have disagreed,[349] the admonition of the rule should be followed even though an admission of fault accompanies the offer of medical assistance. Accordingly, the exceptions to rule 409 should be applied only when the offered evidence tends to prove an issue other than liability[350] and when an express admission can be disclosed without mentioning the offer or promise to pay medical expenses.[351]

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[341] See notes 331 through 333 and accompanying text *supra*.

[342] FED. R. EVID. 409 provides: "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." See Evidence ⇦ 219.

[343] Watford v. Evening Star Newspaper Co., 221 F.2d 31, 36 (D.C. Cir. 1954).

[344] Arnold v. Owens, 78 F.2d 495, 497 (4th Cir. 1935).

[345] Winningham v. Travelers Ins. Co., 93 F.2d 520, 521 (5th Cir. 1937).

[346] Congress made no change in rule 409, and it was neither discussed in committee hearings nor debated on the floor. 2 WEINSTEIN'S EVIDENCE 409-1 (1976).

[347] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[348] FED. R. EVID. 409.

[349] Arnold v. Owens, 78 F.2d 495, 497 (4th Cir. 1935).

[350] *See* Employers Mut. Cas. Co. v. Mosqueda, 317 F.2d 609, 613 (5th Cir. 1963) (payment of attorney's fees by driver's insurer was admissible to prove driver's permission to drive the insured truck).

[351] FED. R. EVID. 409, Advisory Comm. Notes.

> [T]he present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of state-

Although Mississippi excludes evidence of offers to compromise in civil cases,[352] it is unclear if the same exclusion applies to proposals to defray medical expenses. Even though there is no definitive case, the rule seems to be that such evidence is inadmissible. This conclusion is supported by an inference drawn from *Turner v. State*,[353] a criminal case where the defendant's offer to pay the victim's medical expenses was characterized as an "offer to compromise" and ruled admissible in criminal cases.[354] Since *Turner* equated an "offer of compromise" with an "offer to defray medical expenses,"[355] and since offers of compromise have been ruled inadmissible in civil cases,[356] offers to defray medical expenses would probably also be ruled inadmissible. Thus, Mississippi appears to be in accord with the thrust of rule 409, even though Mississippi's statement or admission of fact rule[357] would probably operate in negotiations for payment of medical expenses just as in all other compromises.

Rule 410. Inadmissibility of Pleas, Offers of Pleas, and Related Statements[358]

Rule 410 adopts the established federal practice that withdrawn pleas of guilty or nolo contendere are inadmissible at any prosecution of the person who made the plea.[359] Although the plea may be admitted

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ments is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.

Id.

[352] See notes 324 through 341 and accompanying text *supra*. *See also* Miss. Code Ann. § 11-7-113 (1972) (unaccepted compensation which is withdrawn not admissible).

[353] 176 Miss. 862, 170 So. 642 (1936).

[354] *Id.* at 865, 170 So. at 642.

[355] *Id.* at 865-66, 170 So. at 642.

[356] See notes 324 through 341 and accompanying text *supra*.

[357] See notes 331 through 333 and accompanying text *supra*.

[358] Fed. R. Evid. 410 provides:

Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

See Criminal Law ⚿ 406, 408; Evidence ⚿ 207(4), 265(11).

[359] *See* Kercheval v. United States, 274 U.S. 220, 223 (1927) (guilty plea); *cf.* United

to determine the sentence in the case in which it is entered,[360] the rule excludes evidence of such pleas for all other purposes regardless of whether the court has approved the withdrawal. In addition, offers by the defendant to plead guilty or nolo contendere are also excluded under the rule,[361] as are statements made during plea bargaining. Such utterances may not be used against the declarant substantively or for impeachment purposes in trial, except a subsequent one for perjury or false statement.[362] A further distinction must be made between an offer to plead guilty in return for leniency and offers to bribe complaining witnesses, prosecutors, or other public officers. Evidence of bribery should be admitted.[363] Additionally, the privilege granted under rule 410 may be relinquished; by failing to object, the defendant will be deemed to have waived the benefits of the rule.[364] Finally, care must be taken to prevent evidence of pleas from being used to prejudice a codefendant in a joint trial,[365] or, where plea bargaining has occurred, to prove the prosecutor has doubts about the defendant's guilt.[366]

A significant question that will undoubtedly arise under the language of rule 410 is determining the difference between statements made during plea bargaining and statements made during investigation of the crime. Until a clear rule emerges, an inference should be drawn that statements or admissions made prior to indictment occurred during investigation and those made subsequent to indictment occurred during negotiations.[367]

In Mississippi, convictions based on pleas of nolo contendere[368] are

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States v. Smith, 525 F.2d 1017, 1020 (10th Cir. 1975) (statement made during plea bargaining not admissible even though rule 410 not in effect); United States v. Gallington, 488 F.2d 637, 640 (8th Cir. 1973) (safeguards must be implemented to protect the defendant if he elects to withdraw his plea or if it is rejected by the court).

[360] 2 WEINSTEIN'S EVIDENCE ¶ 410[01], at 410-22 (1976).

[361] United States v. Smith, 525 F.2d 1017, 1021 (10th Cir. 1975).

[362] FED. R. EVID. 410.

[363] *See* Moreland v. United States, 270 F.2d 887, 890 (10th Cir. 1959) (evidence of inquiries for a "deal" made by defendant ruled admissible if made voluntarily).

[364] Moreland v. United States, 270 F.2d 887, 890 (10th Cir. 1959); *cf.* Casados v. United States, 300 F.2d 845, 848 (5th Cir.) (where a codefendant pleads guilty before the jury, no reversible error is committed, especially where no objection is made), *cert. denied,* 373 U.S. 938 (1962).

[365] *See* United States v. Toner, 173 F.2d 140, 142 (3d Cir. 1949) (mention of coconspirator's guilty plea in instruction held reversible error for defendant).

[366] United States v. Collins, 395 F. Supp. 629, 633 (M.D. Pa. 1975); *see* United States v. Verdoorn, 528 F.2d 103, 107 (8th Cir. 1976) (plea bargaining details which showed prosecution's improprieties in obtaining evidence excluded).

[367] 2 WEINSTEIN'S EVIDENCE ¶ 410[07] (1976).

[368] In Mississippi, pleas of nolo contendere are permitted in misdemeanor cases only, Keyes v. State, 312 So. 2d 7, 10 (Miss. 1975), with leave of the court, Williams v. State, 130 Miss. 827, 844, 94 So. 882, 884 (1923).

inadmissible as evidence in subsequent cases,[369] regardless of whether admission of guilt or proof of guilt is sought to be established.[370] This prohibition applies to both subsequent civil and criminal cases.[371] Guilty pleas may be used for substantive or impeachment purposes in subsequent civil cases arising from the same offense, even if previously excluded as involuntary during the criminal proceedings.[372] However, the party against whom the plea is asserted must be given an opportunity to explain the facts surrounding the plea negotiations.[373]

Rules governing use of plea negotiations in criminal cases are not as easily classified, but an analogy might be drawn between pleas and confessions. While involuntary confessions are inadmissible for any purpose in criminal cases, confessions tainted only by the failure to give a *Miranda* warning may be used by the prosecution for impeachment purposes without first establishing voluntariness.[374] Should the defendant charge that a confession was involuntary, the prosecution must prove then that it was freely and intelligently given in order for it to be admissible.[375] In addition, inculpatory facts and evidence revealed through an otherwise inadmissible confession are admissible when substantiated by other independent evidence.[376]

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[369] Keyes v. State, 312 So. 2d 7, 10 (Miss. 1975).

[370] *Id.* at 8.

[371] *Id.* at 8-9. The court followed the rationale of Piassick v. United States, 253 F.2d 658, 661 (5th Cir. 1958) and Mickler v. Fahs, 243 F.2d 515, 517 (5th Cir. 1957).

> "Nolo contendere means, 'I do not contest it.' It is, to be sure, a tacit confession of guilt, but *solely for the purpose of the case in which it is entered.* If it cannot be used in another case based on the same facts it would seem to follow, a fortiori, that it could not be used for collateral purposes in a case founded upon unrelated facts."

312 So. 2d at 8-9 (quoting Piassick v. United States, 253 F.2d 658, 661 (5th Cir. 1958)).

[372] Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970); Kelly v. King, 196 So. 2d 525, 527 (Miss. 1967). *See also* Deposit Guar. Bank & Trust Co. v. Nelson, 212 Miss. 335, 353, 54 So. 2d 476, 480 (1951) (confessions by insane person admissible in civil action). *Compare* Henry v. Toney, 211 Miss. 93, 99, 50 So. 2d 921, 923 (1951) ("a plea of guilty to manslaughter does not necessarily admit a wrongful killing") *with* Wagner v. Gibbs, 80 Miss. 53, 61, 31 So. 434, 434-35 (1902) (defendant's guilty plea to assault charge sufficient to sustain civil jury's award of punitive damages).

[373] Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970); Kelly v. King, 196 So. 2d 525, 527 (Miss. 1967).

[374] Booker v. State, 326 So. 2d 791, 793 (Miss. 1976).

[375] Agee v. State, 185 So. 2d 671, 673 (Miss. 1966).

[376] One early Mississippi decision, Belote v. State, 36 Miss. 96, 118 (1858), sanctioned the use of such evidence against the confessor. A subsequent exception to this rule stated that tainted evidence may be used only if it is also corroborated by evidence other than the involuntary confession from which its discovery resulted. Whitley v. State, 78 Miss. 255, 258, 28 So. 852, 853 (1900). Mississippi recently considered this difficult question again and disallowed, absent independent evidence, the use of physical evidence which was located and identified by the revelations of a retarded defendant subsequent to his invalid confession. Dover v. State, 227 So. 2d 296, 301 (Miss. 1969).

Another perplexing problem arises with regard to withdrawal of pleas of guilty and nolo contendere. Following the rule of *Kercheval v. United States*,[377] the Mississippi Supreme Court allows pleas of guilty and nolo contendere to be withdrawn with leave of court.[378] Withdrawal is conditioned upon the involuntariness of the plea. If a defendant seeks to retract a plea of guilty or nolo contendere, his motion and affidavit must assert his innocence, assert he has a meritorious defense, or assert he entered the plea by mistake or under duress.[379] Once the plea of guilty or nolo contendere is withdrawn, the use that may be made of the plea or of any related statement is unclear. If the plea-confession analogy is legitimate, it might be inferred that an involuntary plea, once withdrawn, may not be used for any purpose. Should withdrawal be denied, the plea could still be used for impeachment purposes. Similarly, related inculpatory statements would be admissible if substantiated by evidence independent of the involuntary plea. Questions surrounding the use and effect of offers to plead guilty or nolo contendere, or related inculpatory statements, remain unanswered in Mississippi, although the cases tend to indicate that a truly voluntary offer to plead guilty or nolo contendere together with accompanying statements would be admissible after withdrawal.

While Mississippi's rule obviously conflicts with rule 410 over the use of guilty pleas in subsequent civil cases, the two rules accord on pleas of nolo contendere. Additionally, analogous decisions tend to show the state's divergence from rule 410's mandate regarding inculpatory statements made during the bargaining process. The authors suggest that, when given an opportunity to state its position in this unsettled area, Mississippi might adopt the protective policy underlying rule 410, which encourages pleas, in view of the increased burden being placed upon our judicial system by criminal matters.

RULE 411. LIABILITY INSURANCE[380]

Rule 411 reflects the rule prevailing among American jurisdictions

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[377] 274 U.S. 220 (1927).

[378] *E.g.*, Langston v. State, 245 So. 2d 579, 582 (Miss. 1971); Debrow v. State, 235 So. 2d 712, 713 (Miss. 1970).

[379] Lambert v. State, 245 Miss. 227, 237, 47 So. 2d 480, 484 (1962); Keys v. State, 55 So. 2d 471, 472 (Miss. 1951); Edwards v. State, 209 Miss. 325, 326, 46 So. 2d 790, 790 (1950); Daniels v. State, 163 Miss. 245, 248, 140 So. 724, 724 (1932).

[380] FED. R. EVID. 411 provides:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or

that excludes evidence on the existence or nonexistence of liability insurance sought to be introduced to prove negligence or wrongful conduct.[381] One primary reason for the rule is to prevent the possible prejudicial effect of letting the jury know that a deep pocket has the responsibility for the payment of a judgment. However, the mere irrelevancy of insurance to the question of fault is itself sufficient grounds for exclusion.[382]

While the existence of liability insurance is not admissible under rule 411 to show fault, it may be admissible to prove other material issues. The rule sets forth the most common exceptions, though they are not intended to be all-inclusive. For example, evidence of the existence or nonexistence of liability insurance is permitted by rule 411 when the question of agency is at issue,[383] or when used to prove the defendant had control over the property or instrumentality involved.[384] Similarly, evidence offered to attack the credibility of a witness by showing his interest, bias, or prejudice is allowed as an exception[385] so long as it is determined that the question of liability insurance has a bearing on the witness' credibility.[386] In most cases where evidence of liability insurance is admissible for impeachment, however, the court, if requested, should instruct the jury that the evidence may be used solely on the issue of credibility and not to show liability or damages.[387]

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bias or prejudice of a witness.

See Federal Civil Procedure ⇦ 1970; Trial ⇦ 127.

[381] *See, e.g.,* Tipton v. Socony Mobil Co., 375 U.S. 34, 35-37 (1963) (per curiam) (evidence that plaintiff received benefits under the Longshoremen's and Harbor Workers' Compensation Act held reversible error); LaMade v. Wilson, 512 F.2d 1348, 1350 (D.C. Cir. 1975) (evidence concerning plaintiff's receipt of collateral social insurance benefits held reversible error); *cf.* American Fidelity Fire Ins. Co. v. Hood, 37 F.R.D. 17, 22 (E.D.S.C. 1965) (denied permissive counterclaim in tort action where it would subvert state law by bringing in the issue of insurance coverage on the question of tort liability).

[382] Brown v. Walter, 62 F.2d 798, 800 (2d Cir. 1933). *See also* the discussion of relevancy and prejudicial effect under FED. R. EVID. 401 & 403.

[383] Hunziker v. Scheidemantle, 543 F.2d 489, 495 n.10 (3d Cir. 1976); Eldridge v. McGeorge, 99 F.2d 835, 841 (8th Cir. 1938).

[384] Dobbins v. Crain Bros. Inc., 432 F. Supp. 1060, 1069 n.15 (W.D. Pa. 1976); Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233, 239 (1961).

[385] Ingalls Shipbuilding Corp. v. Trehern, 155 F.2d 202, 203 (5th Cir. 1946); Majestic v. Louisville & Nash. R.R., 147 F.2d 621, 627 (6th Cir. 1945).

[386] *See* Brown v. Walter, 62 F.2d 798, 799 (2d Cir. 1933) (where testimony had little bearing on witness' credibility, admission unjustified at cost of bringing out fact of insurance).

[387] *See, e.g.,* Paxson v. Davis, 65 F.2d 492, 495 (D.C. Cir.) (upholding instruction that questions concerning witness' employment as insurance adjuster be used solely for credibility purposes), *cert. denied,* 290 U.S. 643 (1933). However, when impeachment is attempted by the use of a statement obtained by the liability insurer's representative, plaintiff's counsel is usually permitted to show the employment of the person taking the

The courts have been more lenient when evidence of liability coverage has been submitted by someone other than the parties. Consequently, it is probable that some difficulty will arise under the provisions of rule 14 of the Federal Rules of Civil Procedure relating to third party practice. For example, in many instances the insurer may be made a third party defendant, thus effectively advising the jury of the existence of liability insurance if the entire matter is tried together. If it appears that prejudice will result, however, the court may use procedural rule 42(b) to grant separate trials on the issues involving disclosure of insurance.[388]

Where disclosure of the existence or nonexistence of liability insurance is injected into the case unexpectedly or in a nonresponsive answer by the witness to a proper question, courts have been reluctant to declare a mistrial in the absence of bad faith on the part of counsel or the witness.[389] If the reference to liability insurance is oblique and not specific,[390] the insured party has probably not been prejudiced. If the reference to insurance is specific and prejudicial, however, a new trial should be granted.[391] At other times when this problem arises, the court will simply strike the reference to insurance from the record and instruct the jury to disregard the testimony.[392]

Rule 411 leaves unanswered the question of what should be done when liability coverage is injected into the case on voir dire. The greatest guidance thus far has been provided by *Langley v. Turner's Express, Inc.*[393] between the probability of danger to plaintiffs that someone sympathetic to insurance companies may remain on the jury and the danger to defendant that the jury may award damages without fault if aware that there is insurance coverage to pay the verdict."[394] Accordingly, such matters will be governed by the discretion of the trial court

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statement. Complete Auto Transit, Inc. v. Wayne Broyles Eng'r Corp., 351 F.2d 478, 481 (5th Cir. 1965); Mideastern Contracting Corp. v. O'Toole, 55 F.2d 909, 912 (2d Cir. 1932).

[388] Fidelity & Cas. Co. v. Mills, 319 F.2d 63, 63-64 (5th Cir. 1963) (per curiam). *See also* Baker v. Moors, 51 F.R.D. 507, 510 (W.D. Ky. 1971).

[389] *See, e.g.*, Dindo v. Grand Union Co., 331 F.2d 138, 141 (2d Cir. 1942) (no abuse of discretion in refusing new trial where witness voluntarily mentioned insurance in response to "yes or no" question).

[390] Gleaton v. Green, 156 F.2d 459, 461 (4th Cir. 1946).

[391] *See, e.g.*, F.W. Woolworth Co. v. Davis, 41 F.2d 342, 345 (10th Cir.) (court noted serious responsibility of trial court and counsel to exclude irrelevant and prejudicial matters particularly in jury trials), *cert. denied*, 282 U.S. 859 (1930).

[392] *Cf.* Gleaton v. Green, 156 F.2d 459, 462 (4th Cir. 1946) (holding failure of judge to instruct jury to disregard casual reference by witness not error where defendant did not request such instruction).

[393] 375 F.2d 296 (4th Cir.1967).

[394] *Id.* at 297. *But see* Kiernan v. Van Schaik, 347 F.2d 775, 781-82 (3d Cir. 1965) (holding right to fair trial overrides policy against possible suggestions of insurance).

rather than the provisions of rule 411.

Mississippi first considered use of liability insurance evidence in the landmark decision of *Herrin, Lambert & Co. v. Daly*,[395] where the defendant was asked on cross-examination whether or not there was anyone "back of his firm" who would satisfy any judgment obtained against him. Holding that the objection to this question had been erroneously overruled, the Mississippi Supreme Court stated that "[i]t could not conceivably throw any light on the issue, and could have no other tendency than to seduce a verdict on the ground that an insurance company, and not the defendants, would be affected."[396] In addition to being irrelevant, the policy of the court favoring exclusion recognized that to admit such evidence would suggest that "some invisible corporation" would pay the damages, a policy the court could not embrace.[397]

From the many decisions following *Daly*[398] it is clear that reference to liability insurance by plaintiff's counsel is almost invariably reversible error.[399] Improper revelation by the plaintiff of the existence of liability insurance may occur in many situations, including voir dire,[400] direct examination of a plaintiff's witness,[401] cross-examination of the defendant,[402] a defense witness,[403] or an adverse witness,[404] direct submission of evidence to the court,[405] and argument to the jury.[406] A

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[395] 80 Miss. 340, 31 So. 790 (1902).

[396] *Id.* at 342, 31 So. at 791.

[397] Odom v. Walker, 193 Miss. 862, 871-72, 11 So. 2d 452, 455 (1943).

> There can scarcely be made to a jury a more seductive and insidious suggestion than that a verdict for damages against the defendant before them will be visited, not upon the defendant, but upon some invisible corporation whose business it is to stand for and pay such damages. Such a suggestion, once lodged in the minds of the jury, is almost certain to stick in their consciousness, and to have its effect upon their verdict, regardless of any theoretical exclusion of it by the trial judge. In such cases the obvious, and indeed the only, remedy is to set aside the verdict and order another trial.

Id.

[398] *See* notes 399 through 406 and accompanying text *infra*.

[399] Lancaster v. Lancaster, 213 Miss. 536, 541, 57 So. 2d 302, 304 (1952). In *Lancaster*, however, the court concluded that admission of such evidence was not reversible error where the action was against three defendants, and the testimony was not specifically addressed to any one of them. *Id.* The court pointed out that "[t]he rule may not be uniformly packaged for general use under any designated label. Each case presents its own problem . . . ." *Id.*

[400] See notes 423 & 424 and accompanying text *infra*.

[401] Whatley v. Boolas, 180 Miss. 372, 383, 177 So. 1, 3-4 (1937).

[402] Herrin, Lambert & Co. v. Daly, 80 Miss. 340, 342, 31 So. 790, 791 (1902).

[403] M. & A. Motor Freight Lines, Inc. v. Villere, 190 Miss. 848, 858-59, 1 So. 2d 788, 791 (1941).

[404] Morris v. Huff, 238 Miss. 111, 118-20, 117 So. 2d 800, 802-03 (1960); Snowden v. Skipper, 230 Miss. 684, 696-98, 93 So. 2d 834, 839-40 (1957).

[405] Smith v. Hicks, 201 So. 2d 35, 37 (Miss. 1967).

mistrial will not be granted where the plaintiff's inquiries are insufficient to clearly inject the issue of insurance,[407] where the defendant raises the same issue,[408] or where the plaintiff injects the issue and assigns it as error on appeal.[409]

Since the plaintiff is precluded from revealing the defendant's insurance coverage, the supreme court has held that the defendant is likewise precluded from revealing his own lack of coverage[410] as well as any coverage the plaintiff may have.[411] Furthermore, if the defendant affirmatively injects his insurance coverage into the trial[412] or invites a response from the plaintiff concerning the subject,[413] the defendant cannot assign the injection as error on appeal.[414]

Recognizing the necessity for certain exceptions to the general rules, the Mississippi Supreme Court permits the introduction of evidence concerning insurance where material issues are involved, such as agency,[415] contractual relationship,[416] or particular use of a vehicle.[417] Having taken the position that liability insurance evidence is proper to

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[406] Scott County Coop. v. Brown, 187 So. 2d 321, 325 (Miss. 1966); Morris v. Huff, 238 Miss. 111, 118-20, 117 So. 2d 800, 802-03 (1960); Byram v. Snowden, 224 Miss. 74, 81-82, 79 So. 2d 541, 543-44 (1955).

[407] Williams v. Larkin, 166 Miss. 837, 847-48, 147 So. 337, 339 (1933).

[408] Chilcutt v. Keating, 220 Miss. 545, 551, 71 So. 2d 472, 475 (1954).

[409] Ginn v. Culpepper, 243 Miss. 55, 57, 137 So. 2d 179, 180 (1962). In one unusual case in which a juror was permitted to question the plaintiff about insurance, the plaintiff's statement that "the company paid," was held sufficient to require a mistrial. Walley v. Williams, 201 Miss. 84, 89-91, 28 So. 2d 579, 580-81 (1947).

[410] Avent v. Tucker, 188 Miss. 207, 225-26, 194 So. 596, 601-02 (1940). In *Avent*, the trial court's refusal to allow the defendant to negate existence of coverage was upheld where a defense witness had mentioned settlement on cross-examination. The court pointed out that "[i]t would be manifestly unfair to permit a defendant . . . to show he carried no insurance and whatever verdict was rendered would be enforced upon him personally." *Id.* at 225-26, 194 So. at 602.

[411] S.H. Kress & Co. v. Markline, 117 Miss. 37, 45, 77 So. 858, 861 (1918); *cf.* Southern Ry. v. McLellan, 80 Miss. 700, 709, 32 So. 283, 285 (1902) (plaintiff's poverty inadmissible).

[412] Caskey v. Treadwell, 299 So. 2d 691, 692-93 (Miss. 1974); Petermann v. Gary, 210 Miss. 438, 447-48, 49 So. 2d 828, 832 (1951); Allen v. Friedman, 156 Miss. 77, 82, 125 So. 539, 540 (1930).

[413] Lancaster v. Lancaster, 213 Miss. 536, 540-41, 57 So. 2d 302, 304 (1952).

[414] Caskey v. Treadwell, 299 So. 2d 691, 692-93 (Miss. 1974); Lancaster v. Lancaster, 213 Miss. 536, 540-41, 57 So. 2d 302, 304 (1952); Petermann v. Gary, 210 Miss. 438, 447-48, 49 So. 2d 828, 832 (1951); Allen v. Friedman, 156 Miss. 77, 82, 125 So. 539, 540 (1930).

[415] *E.g.*, Luke Constr. Co. v. Jernigan, 252 Miss. 9, 14-15, 172 So. 2d 392, 393 (1965); Long-Bell Lumber Sales Corp. v. Perritt, 178 Miss. 194, 202, 172 So. 747, 749 (1937); Pan-American Petroleum Corp. v. Pate, 157 Miss. 822, 831, 126 So. 480, 482 (1930); Finkbine Lumber Co. v. Cunningham, 101 Miss. 292, 302, 57 So. 916, 918 (1912).

[416] *E.g.*, Building Insulators, Inc. v. Stuart, 243 Miss. 287, 291-92, 136 So. 2d 613, 614-15 (1962).

[417] *E.g.*, Savery v. Gray, 51 So. 2d 922, 924 (Miss. 1951).

show a witness' prejudice,[418] the court similarly permits such evidence for impeachment purposes.[419] Additionally, where the question of insurance is injected into the case through unsolicited or inadvertent discussion, Mississippi follows the rule established in *Jackson v. Reed*[420] that an irresponsive answer revealing insurance coverage is not a ground for a mistrial in the absence of an excessively prejudicial impact.[421] Evaluation of the prejudice caused by volunteered evidence must be made in light of the conduct of counsel and attitude of the parties and rests exclusively with the trial court.

The court has been faced with a troublesome problem in trying to establish the extent that insurance coverage may properly be revealed during voir dire. Indeed, in the past the court has applied two tests to determine the extent that jurors may be questioned regarding any personal connection or interest they may have with an insurance company. Initially, Mississippi allowed this type of examination if the attorneys conducted themselves in a good faith effort to elicit facts which might unduly influence the jury.[422] However, the court later began to scrutinize the possible prejudicial effect resulting from this type of questioning as

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[418] Mississippi Ice & Util. Co. v. Pearce, 161 Miss. 252, 262-64, 134 So. 164, 167 (1931).

> The rule denying the right to show that defendant in a negligence case carries liability insurance is not intended to override the equally positive and salutary principle that a party has the right to cross-examine the witness produced by his adversary, touching every relation tending to show interest or bias, if the insurance company chooses to come before the jury, and place its own witnesses upon the stand, the plaintiff should be permitted to ask them if they are not there for the insurance company, which has produced them, or connected with it, for the case cannot be honestly placed before the jury without disclosure of the relation which such witnesses sustain to that company.

Id.

[419] *Id.*

[420] 233 Miss. 280, 102 So. 2d 342 (1958).

[421] *Id.* at 300-01, 102 So. 2d at 350-51. "[A]n appellate court should be reluctant to nullify such judgment unless it is clear that one of the parties was responsible for the error, or aided and abetted therein, and that such error was prejudicial." *Id. See generally* Ernest Yaeger & Sons, Inc. v. Howell, 234 So. 2d 899, 901 (Miss. 1970); Williams v. Moran, 233 So. 2d 110, 112-13 (Miss. 1970).

[422] Yazoo City v. Loggins, 145 Miss. 793, 110 So. 833 (1926).

> [T]his rule does not prohibit counsel from testing, within reasonable limits, and in good faith, the qualifications of proposed jurors in respect to their connection with or interest in any indemnification the defendant may have, or their interest in or connection with any company engaged in like business . . . and such an examination is proper so long as it is conducted in good faith to discover the state of mind of the juror as regards such interest, or any collateral matter reasonably liable to unduly influence him.

Id. at 808, 110 So. at 835. *See generally* Lee County Gin Co. v. Middlebrooks, 161 Miss. 422, 428-29, 137 So. 108, 109 (1931); Mississippi Ice & Util. Co. v. Pearce, 161 Miss. 252, 264, 134 So. 164, 167 (1931).

well as the motive.[423] Thus, the focus was gradually shifted from motive to effect, and today it is clear that revelation of a juror's interest, bias, or connection with liability insurers is determined by the prejudicial effect of the disclosure rather than the attorney's motive for eliciting the disclosure.[424]

Mississippi follows the general rule that failure to move for a mistrial when insurance is improperly injected is a waiver of the objection,[425] though a trial court can raise the objection of its own volition.[426] Similarly, if only part of a statement or question is inadmissible, a specific objection to the improper portion is required.[427] Admissibility of such evidence is, however, a matter within the discretion of the trial court.[428] From this analysis of the Mississippi authorities, it may be concluded that the rules governing the use of evidence of liability insurance closely parallel and comport with the provisions of rule 411.

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[423] In Avery v. Collins, 171 Miss. 636, 650-51, 157 So. 695, 699 (1934), the court noted that if the juror's qualifications could be adequately ascertained without direct reference to insurance, inquiry into occupation and business interests should be allowed. If it is necessary to ask questions that could lead to the inference that defendant is insured, the judge should admonish the jury not to consider the fact on the issue of either liability or damages. *Id.* Finally, the court completely broke from the good faith test it had established in M. & A. Motor Freight Lines, Inc. v. Villere, 190 Miss. 848, 1 So. 2d 788 (1941). Avery v. Collins, 171 Miss. at 651, 157 So. at 699.

[424] In Odom v. Walker, 193 Miss. 862, 11 So. 2d 452 (1943), after a review of prior decisions, the court stated:

> It is true that in some of these cases the extent of the error has been determined by the wrongful conduct in disclosing this information to the jury . . . . Nevertheless, the idea was implanted in the minds of the jurors at the beginning of the trial that these defendants, who were local people, were insured against liability and a judgment against them would cost them nothing.

Id. at 872, 11 So. 2d at 455. This position was solidified in Walley v. Williams, 201 Miss. 84, 90-91, 28 So. 2d 579, 580-81 (1947) (prejudice test of *Odom* followed), and firmly established in Shearron v. Shearron, 219 Miss. 27, 68 So. 2d 71 (1953) (per curiam). "We agree . . . and would observe that the good faith test is impractical . . . . [T]he test should be whether the line of interrogation used here was necessary in order for plaintiff on the facts in the particular case to qualify the jury. Such necessity would exist only in rare cases." *Id.* at 62, 68 So. 2d at 86 (Ethridge, J., concurring in part and dissenting in part). Although the most recent decision on this issue does not elaborate, it seems that the "prejudice" test now prevails. *See* Catholic Diocese of Natchez-Jackson v. Jaquith, 224 So. 2d 216, 233 (Miss. 1969).

[425] Robertshaw v. Columbus & G. Ry., 185 Miss. 717, 725, 188 So. 308, 309-10 (1939).

[426] *Id.* at 726, 188 So. at 310. "[T]he case as presented is not one of such extreme harm or gross wrong or error of such a fundamental nature as that the court was obliged to tender a mistrial of the court's own motion, conceding for the time being that there may be such a case." *Id.*

[427] Galtney v. Wood, 149 Miss. 56, 65-66, 115 So. 117, 119-20 (1928).

[428] Williams v. Moran, 233 So. 2d 110, 114 (Miss. 1970); Copiah Dairies, Inc. v. Addkison, 247 Miss. 327, 339, 153 So. 2d 689, 694 (1963).

Conclusion

Article IV of the Federal Rules of Evidence represents the majority view and modern trend of the law of relevancy. Relevancy problems must be approached from the realization that specific rules can be provided only for those few situations that often reoccur. For the many situations that fall into no set pattern, the drafters wisely provided only general criteria for the determination of relevancy. The Mississippi rules governing the admissibility of relevant evidence, though not codified, closely parallel the respective federal rules in many areas. They are not, however, identical. In some cases there are direct conflicts; in others, the differences are more technical than substantive. It has been the authors' purpose to examine, analyze, and compare the federal and Mississippi rules pertaining to relevancy. This interplay between the two sets of rules should prove to be a valuable conceptual tool to the practitioner.

PRIVILEGES

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Evidentiary privileges offer an exception to the general rule favoring disclosure of all relevant facts from otherwise competent witnesses.[1] There are five types of privileges: (1) professional, encompassing attorney-client, doctor-patient and priest-penitent; (2) judicial, dealing with communications between jurors, judges and informers; (3) political, covering government officials and state secrets; (4) social, relating to husband-wife, newsmen and guidance counselors;[2] and (5) constitutional, such as the privilege against self-incrimination.[3] These privileges may be grouped together more broadly into: (a) those which protect the individual (number (5) above); (b) those which protect governmental integrity (numbers (2) and (3) above); and (c) those protecting relationships (numbers (1) and (4) above).[4]

The last category, interpersonal relationships, is the one which will be addressed in this Article. Mississippi law regarding the privileges of doctor-patient, attorney-client, husband-wife, priest-penitent, and accountant-client will be discussed in detail. Since the Article will focus on state-created privileges, which rule 501 of the Federal Rules of Evidence makes applicable to diversity cases in the federal courts,[5] the federal law of privileges as represented by the Federal Standards of Evidence[6] will be discussed only in comparison to the Mississippi rules. It is presumed that the state rules of privilege discussed hereafter supply the rule for those diversity suits involving Mississippi causes of action.

I. Interpersonal Privileges

A. Generally

The underlying purpose of all interpersonal privileges is to encourage the free flow of information between "persons standing in a relation

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[1] R. Donigan, E. Fisher, R. Reeder & R. Williams, The Evidence Handbook 177 (1977) [hereinafter cited as Evidence Handbook].

[2] *Id.* at 177-78.

[3] C. McCormick, Handbook of the Law of Evidence § 74, at 153-54 (2d (E. Cleary) ed. 1972).

[4] Comment, *Privileged Communications: The Federal Rules of Evidence and Indiana Law; Who's Got a Secret*, 9 Ind. L. Rev. 645, 645 (1976).

[5] Blackledge v. Martin K. Eby Constr. Co., Inc., 542 F.2d 474, 476 n.1 (8th Cir. 1976).

[6] *See generally* 2 Weinstein's Evidence ¶¶ 501[01]-[05], at 501-1 to -40 (1976).

of confidence and trust,"[7] and the privileges exist primarily to foster and protect such relationships.[8] The key to assertion of any interpersonal privilege, therefore, lies in establishing the relationship, for it is not the communication itself that is sought to be protected, but the relationship from which it emanates.[9] Dean Wigmore underscores this theme in his standards for establishing an interpersonal privilege: (1) the communication must originate in a mutual confidence that it will not be disclosed to anyone else; (2) confidentiality must be essential to the efficient maintenance of an intimate relationship; (3) the relationship itself must be recognized in the community as one which ought to be fostered; and (4) the situation must be such that disclosure of the communication would injure the relationship more seriously than the suppression of evidence would injure the administration of justice.[10]

B. Privileges versus Competency

The concepts of privilege and competency are often confused. Generally, competency relates to the sufficiency of a witness' qualifications to testify about matters within his knowledge.[11] Thus, any competency objection should go to the witness himself. On the other hand, privileges concern the subject matter to which an otherwise competent witness may testify.[12] Either party may object to the calling of an incompetent witness, but only the party entitled to the protection of a privilege has standing to object on those grounds.[13] The Mississippi Supreme Court has recognized this distinction: "The [privilege] statute does not make the evidence incompetent. It is competent, but it cannot be introduced, because the law has conferred the privilege upon the person in whose favor the privilege exists to keep it out or to admit it according to his desires."[14] In Mississippi, therefore, any witness with relevant facts within his knowledge is competent to testify,[15] but he may not divulge privileged communications.

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[7] EVIDENCE HANDBOOK, *supra* note 1, at 177.

[8] Sedler & Simeone, *The Realities of the Attorney-Client Confidences*, 24 OHIO ST. L.J. 1, 3 (1963).

[9] *See, e.g.*, People *ex rel.* Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415, 416 (1936) (communication made to newspaper reporter by informant not privileged), *noted in* 102 A.L.R. 769 (1936). *See generally* EVIDENCE HANDBOOK, *supra* note 1, at 178.

[10] J. WIGMORE, CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW § 2405, at 424-25 (3d ed. 1942).

[11] EVIDENCE HANDBOOK, *supra* note 1, at 178.

[12] *Id.*

[13] *Id.* at 179.

[14] Davenport v. State, 143 Miss. 121, 128, 108 So. 433, 434 (1926).

[15] *E.g.*, Dennis v. Prisock, 221 So. 2d 706, 710 (Miss. 1969). This statement is, of course, subject to the husband-wife competency provisions. See section V. *infra*.

II. The Federal Rules of Evidence

A. *The General Rule*[16]

The United States Supreme Court originally proposed thirteen rules of privilege to Congress.[17] The effect of these proposed privileges would have been to ignore privileges created by state law, terminate the open-ended development of federal privilege law by disallowing development on a case-by-case basis, and narrow the application of those privileges which were allowed.[18] The proposed rules immediately created controversy,[19] sparking disagreement over each particular privilege and delaying final passage of the Federal Rules of Evidence.[20]

Much of the dissatisfaction was based on the treatment of state-created privileges as substantive rules of law in federal diversity cases.[21] Many felt that imposing a federal law of privileges in diversity cases would disrupt the state policy behind the privileges,[22] especially since most federal courts sitting in diversity cases had previously felt compelled to apply privileges in accordance with state policies.[23] In addition, the federal courts had been divided on whether state or federal privilege law was to apply in federal question cases.[24] While not going so far as to

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[16] Fed. R. Evid. 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

[17] Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315, 356-83 (1971). The Proposed Rules were the result of seven years of work by an Advisory Committee and were adopted by an eight to one vote of the Supreme Court. 2 Weinstein's Evidence ¶ 501[02], at 501-20.4 (1976).

[18] 2 Weinstein's Evidence ¶ 501[01], at 501-12, -13 (1976).

[19] Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 Geo. L.J. 613, 615 (1976).

[20] *See generally* 2 Weinstein's Evidence ¶ 501[01], at 501-12 (1976); Krattenmaker, *supra* note 19, at 614-15.

[21] *See* Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 340 (5th Cir. 1972) (state-created attorney-client privilege is substantive and therefore applies in diversity cases).

[22] H.R. Rep. No. 650, 93d Cong., 1st Sess. 2 (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075, 7076. *See generally* S. Rep. No. 1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7051; Krattenmaker, *supra* note 19, at 638-40, 646; Comment, *supra* note 4, at 673-78.

[23] Krattenmaker, *supra* note 19, at 628-29. *See generally* 44 Cal. L. Rev. 949 (1956).

[24] Krattenmaker, *supra* note 19, at 628. *Compare* Baird v. Koerner, 279 F.2d 623, 632 (9th Cir. 1960) (state law concerning attorney-client relationship controls) *and* United

apply state-created privileges, many federal courts at least paid lip service to them in federal question cases.[25] Only in criminal cases, under former rule 25 of the Federal Rules of Criminal Procedure, had the federal courts consistently decided privilege questions according to federal law.[26] Congress refused to adopt the proposed rules and instead enacted rule 501 alone.[27] The unadopted proposed rules have become the Federal Standards of Evidence.[28] As a restatement of prior federal policies which were intended by the Supreme Court to become the law and which are unaltered by subsequent cases,[29] the standards "are a convenient, comprehensive guide to the federal law of privileges as they now stand . . . ."[30] In contrast, while rule 501 requires strict application of the federal law of privilege in federal criminal cases[31] and general application in federal question cases,[32] the rule calls for adherence to state law in diversity actions or in any case where state law determines the outcome of a claim or defense.

B. Federal Question Cases

The four basic types of federal privileges include constitutional,

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States v. Becton Dickinson & Co., 212 F. Supp. 92, 95 (D.N.J. 1962) (same) *with* United States v. Harper, 450 F.2d 1032, 1035 (5th Cir. 1971) (federal law concerning attorney-client relationship controls) *and* Garner v. Wolfinbarger, 430 F.2d 1093, 1098-100 (5th Cir. 1970) (federal law concerning attorney-client relationship controls where there is a strong federal interest and no substantial state interest is infringed), *cert. denied*, 401 U.S. 974 (1971).

[25] *See, e.g.*, United States v. Brunner, 200 F.2d 276, 280 (6th Cir. 1952) (state-created privilege not applicable in suit seeking damages for erroneous federal conviction and imprisonment); Fraser v. United States, 145 F.2d 139, 144 (6th Cir. 1944) (state-created privilege not applicable in federal equity suit challenging liability under the Agricultural Adjustment Act), *cert. denied*, 324 U.S. 849 (1945); Krattenmaker, *supra* note 19, at 629.

[26] Krattenmaker, *supra* note 19, at 630. FED. R. CRIM. P. 26 (1945), formerly provided:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they might be interpreted by the courts of the United States in light of reason and experience.

For federal policy prior to rule 501, see Lutwak v. United States, 344 U.S. 604, 614-15 (1953) (husband-wife); United States v. Armstrong, 476 F.2d 313, 315 (5th Cir. 1973) (same); United States v. Harper, 450 F.2d 1032, 1035 (5th Cir. 1971) (doctor-patient); United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971) (priest-penitent); United States v. Mullings, 364 F.2d 173, 176 n.3 (2d Cir. 1966) (doctor-patient); Mullen v. United States, 263 F.2d 275, 277-80 (D.C. Cir. 1958) (priest-penitent); United States v. Schlegal, 313 F. Supp. 177, 178 (D. Neb. 1970) (attorney-client).

[27] 2 WEINSTEIN'S EVIDENCE ¶ 501[02], at 501-2 (1976).

[28] *Id.*; Krattenmaker, *supra* note 19, at 615.

[29] See note 18 and accompanying text *supra*.

[30] 2 WEINSTEIN'S EVIDENCE ¶ 501[02], at 501-20.5 (1976).

[31] *Id.*

[32] *Id.*

statutory, and common law privileges in addition to those provided in rules prescribed by the Supreme Court.[33] Although the common law will most frequently apply, there has been no uniform development of federal privilege law.[34] Rule 501 therefore sanctions the courts to develop federal privileges on a case-by-case basis when federal questions are involved.[35] It has been suggested that the court should look first in such cases for any congressionally created privileges.[36] In their absence, the court should look to the law of the state where the communication took place and apply that law if it is appropriate in light of reason and experience and does not conflict with federal policy.[37] State law should be given a preference in such cases because it is the state which protects, fosters, and regulates the relationship from which the privilege springs.[38] Where the federal law has adopted a state rule of decision, however, that rule should apply.[39] Finally, where neither state nor federal law addresses the matter, the court should turn to the common law as interpreted in light of reason and experience.[40] Judge Weinstein asserts that the federal standards not only represent a restatement of the federal law of privileges but also reflect the common law in "light of reason and experience" and therefore should be consulted in many of the above situations.[41]

C. Diversity Cases

The diversity provision in rule 501 provides the greatest propensity for potential problems. One such problem concerns the meaning of the phrase, "element of a claim or defense to which a State law supplies the rule of decision," which the Senate Committee on the Judiciary felt was

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[33] *Id.*

[34] Krattenmaker, *supra* note 19, at 631.

[35] 120 CONG. REC. 40891 (1974) (remarks of Rep. Hungate); Comment, *supra* note 4, at 647.

[36] Krattenmaker, *supra* note 19, at 663.

[37] *Id.; see Hearings Before the Special Subcomm. on the Reform of Federal Criminal Laws of the Comm. on the Judiciary on Proposed Rules of Evidence*, Serial No. 2, 93d Cong., 1st Sess., at 449 (1973) (statement of Patricia Wald) (federal rule applicable only where compelling federal interest); *cf.* Carr v. Monroe Mfg. Co., 431 F.2d 384, 388 (5th Cir. 1970) (federal interest requires disclosure of information in state government records despite state privilege).

[38] Krattenmaker, *supra* note 19, at 659-60.

[39] H.R. CONF. REP. No. 1597, 93d Cong., 2d Sess. 7 (quoting D'Onech, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 471 (1942) (Jackson, J., concurring)), *reprinted in* 120 CONG. REC. 39939, 39941 *and* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7100-01.

[40] 2 WEINSTEIN'S EVIDENCE ¶ 501[02], at 501-20.4 to -20.5 (1976); Krattenmaker, *supra* note 19, at 664.

[41] 2 WEINSTEIN'S EVIDENCE ¶ 501[02], at 501-20.4 to -20.5 (1976).

"pregnant with litigious mischief" because of the difficulty of distinguishing between an "element of a claim" and an "item of proof" with regard to a claim.[42] An element of a claim or defense with regard to state law will depend on the interpretation of "element," which has been described as an item tending to support a material claim or defense, regardless of the situation in which the proof is utilized.[43] If the evidence consists of a mere item of proof as opposed to an element of a claim, then federal law should apply under the language of rule 501.[44]

When a case involves both federal and state claims, the legislative history of rule 501 suggests that the court is to follow federal privilege law on the federal question and state law on the state claim.[45] The history also indicates that when an item of proof goes to both state and federal claims, the federal rule should be followed to allow the item to be admitted into evidence.[46] Allowing such an item into evidence, however, could result in waiver of the state-created privilege relative to the state claim.[47] Accordingly, in those cases where the federal privilege is narrower than that of the state, the court should not find a waiver of the state privilege merely because federal policy favors admission in breach of the state policy.[48]

Another problem in applying rule 501, virtually a nonrule because of its deferral to state law in diversity cases, arises with regard to conflicts of law.[49] Mississippi has adopted the "center of gravity" test for choice-of-law determination, under which the forum court selects the law of the state which has the greatest interest in the case and most significant contacts with the parties and facts.[50] Weinstein, however,

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[42] S. REP. No. 1277, 93d Cong., 2d Sess. 12, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7058-59. *See also* Comment, *supra* note 4, at 648.

[43] 2 WEINSTEIN'S EVIDENCE ¶ 501[02], at 501-18 (1976).

[44] Comment, *supra* note 4, at 648-49.

[45] H.R. REP. No. 1597, 93d Cong., 2d Sess. 708, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7100-01; Krattenmaker, *supra* note 19, at 662.

[46] S. REP. No. 1277, 93d Cong., 2d Sess. 12 & 12 n.17, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7059 & 7059 n.17; *see* 2 WEINSTEIN'S EVIDENCE ¶ 501[02], at 501-19 (1976). This situation could occur in a rule 10b-5 action with a pendent state claim of fraud. Since intent is a necessary element of both federal and state claims, an item of proof directed to intent should, according to the drafters, be admitted even though the item is privileged under state law.

[47] 2 WEINSTEIN'S EVIDENCE ¶ 501[02], at 501-19 (1976).

[48] Krattenmaker, *supra* note 19, at 664. For a discussion on conflicts of federal and state privileges, see Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 299-301 (1962).

[49] *See generally* Krattenmaker, *supra* note 19, at 662-63.

[50] *E.g.*, Mitchell v. Craft, 211 So. 2d 509, 514-16 (Miss. 1968) (wrongful death). The Fifth Circuit has adopted this test to be applied to privileges in Mississippi diversity cases. *E.g.*, Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 340-41 (5th Cir. 1972) (significant contacts test applies to attorney-client privilege). Under this rule of law, the state with

favors an approach which takes into account the policies behind the various rules of privilege.[51] He advocates applying the rule of privilege of the state whose policy behind the privilege would be most advanced if applied, *i.e.* the state whose policies would be most frustrated if another rule were applied.[52] Thus, if a court is faced with choosing the privilege from either the forum state, the state whose substantive law is being applied, the state where the communication was made, or the state where a deposition was held, it should look to the state whose rule of privilege will most advance the policy of the state creating the privilege[53] and not to the state with the "most substantial contacts."

III. Physician-Patient Privilege

A. Generally

The physician-patient privilege did not exist at common law,[54] and a patient's doctor has traditionally been viewed as a competent witness in all legal proceedings.[55] In 1906, however, Mississippi enacted a medical privilege statute[56] which has been "broadly and sympathetically" upheld by the Mississippi Supreme Court[57] to the disdain of many defense lawyers.[58]

The Mississippi medical privilege applies with equal force in civil and criminal cases[59] but is most often claimed in actions based on life

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"the most substantial contacts with the occurrences on which the [case] rests" supplies the rule of privilege. *Id.* at 341.

[51] 2 Weinstein's Evidence ¶ 501[02], at 501-19 (1976).

[52] *Id.* at 501-20.1 to -20.4.

[53] *Id.* Weinstein's conflicts approach is reminiscent of the "comparative impairment" conflict of laws approach used by the California courts. Under this test, the state whose policies would be most impaired if its law were not applied supplies the rule of decision on a given issue. Bernhard v. Harrah's Club, 16 Cal. 3d 313, 316, 320, 546 P.2d 719, 720, 723-24, 128 Cal. Rptr. 215, 216, 219, *cert. denied*, 429 U.S. 859 (1976).

[54] Hardy v. Riser, 209 F. Supp. 1234, 1237 (N.D. Miss. 1970); C. McCormick, *supra* note 3, § 98, at 212. See Evidence ⚖77(6); Trial ⚖211, 234(8); Witnesses ⚖5, 207-14, 219(4)-(6), 292, 305.

[55] 8 J. Wigmore, Evidence in Trials at Common Law § 2380, at 818 (J. McNaughton rev. 1961).

[56] Miss. Code § 3695 (1906) (current version at Miss. Code Ann. § 13-1-21 (Supp. 1977)). *See generally* Lipscomb, *Privileged Communications Statute—Sword and Shield*, 16 Miss. L.J. 181 (1944).

[57] Killings v. Metropolitan Ins. Co., 187 Miss. 265, 273, 192 So. 577, 579 (1940).

[58] The authors include themselves in this group. *See generally* Adam, *Expert Medical Testimony in Mississippi*, 40 Miss. L.J. 241, 254 (1969); Lipscomb, *supra* note 56, at 190; Welch, *Another Anomaly—The Patient's Privilege*, 13 Miss. L.J. 137, 145 (1941).

[59] Keeton v. State, 173 Miss. 631, 648, 167 So. 68, 71 (1936). *But cf.* Davenport v. State, 143 Miss. 121, 125, 108 So. 433, 435 (1926) (testimony in criminal cases by physician who attended decedent held admissible).

or health insurance policies, personal injury actions regarding damages, and will contests concerning testamentary capacity.[60] Under the court's construction of the statute, the effect of the privilege has been to "close the lips of the physician concerning any and everything he knows about the patient by oral communication or from a physical examination of his patient."[61] Unauthorized divulgence of the matter protected by the medical privilege may result in liability for the physician or hospital.[62]

Since only a patient may claim or waive the medical privilege,[63] its purpose is arguably to protect the patient.[64] Although the Mississippi Supreme Court has not consistently advanced protection of the patient as the sole justification of the privilege,[65] that reasoning has probably become the most widely recognized.

> The manifest reason and obvious purpose of the statute is to enable a patient to disclose his infirmities to his physician in order that the physician may prescribe for his disease without fear that . . . his reputation will be tarnished by their disclosure by the physician without his consent . . . .[66]

Because the patient privilege statute is in derogation of the common law, it has been strictly construed.[67] The Mississippi Supreme Court ruled as early as 1928 that the statute created a procedural or mere evidentiary rule of law rather than a substantive one.[68] Consequently, the denial of a party's right to question a doctor on privileged matters when the patient's injuries are at issue has been held to be neither a denial of substantive rights[69] nor a denial of equal protection.[70]

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[60] Welch, *supra* note 58, at 139 (1941).

[61] Yazoo & M.V.R.R. v. Decker, 150 Miss. 621, 640, 116 So. 287, 291-92 (1928).

[62] Young v. Madison Gen. Hosp., 337 So. 2d 931, 934 (Miss. 1976).

[63] Sovereign Camp, Woodmen of the World v. Farmer, 116 Miss. 626, 645, 77 So. 655, 656 (1918).

[64] C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 46-47 (1958).

[65] *Compare* Life & Cas. Co. v. Walters, 180 Miss. 394, 394, 177 So. 47, 49 (1937) (to protect "confidential matters") *and* McCaw v. Turner, 126 Miss. 260, 271, 88 So. 705, 705 (1921) (to protect the "patient") *with* Gulf M. & N.R.R. v. Willis, 171 Miss. 732, 739, 157 So. 899, 901 (1934) (to protect "physicians and surgeons").

[66] McCaw v. Turner, 126 Miss. 260, 271, 88 So. 705, 705 (1921).

[67] *See* Gulf, M. & N.R.R. v. Willis, 171 Miss. 732, 739, 157 So. 899, 901 (1934) (medical privilege statute held not to cover dentists); Goodman v. Lang, 158 Miss. 204, 209, 130 So. 50, 51 (1930) (medical privilege statute held not to cover nurses); *cf.* McInnis v. State, 97 Miss. 280, 290, 52 So. 634, 636 (1910) (strict construction of embezzlement statute held in derogation of common law).

[68] Metropolitan Life Ins. Co. v. McSwain, 149 Miss. 455, 459, 115 So. 555, 557 (1928); *accord*, Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 273, 192 So. 577, 579 (1940).

[69] New Orleans & N.E.R.R. v. Jackson, 145 Miss. 702, 711, 110 So. 586, 587-88 (1926).

[70] Brookhaven Lumber & Mfg. Co. v. Adams, 132 Miss. 689, 698, 97 So. 484, 486

As plaintiffs turned to the federal courts for personal injury redress, however, a dilemma grew out of the fact that federal law provides no evidentiary physician-patient privilege.[71] If the Mississippi medical privilege was indeed a mere procedural rule, would the Mississippi federal courts in diversity settings not be justified by *Erie R.R. v. Tompkins*[72] in refusing to apply the privilege? Judge Keady, writing for the United States District Court for the Northern District of Mississippi, put the issue to rest in *Hardy v. Riser*:[73]

> Thus, it would seem that if the Mississippi interpretation of its own statute were literally followed, there would be no physician-patient privilege whatsoever in federal courts sitting in diversity cases in Mississippi. We seriously doubt, however, that any such startling result was ever intended by the State Supreme Court when it declared the privileged communication statute to be procedural and not substantive. It appears that the prime consideration of those cases was upholding the medical privilege and the constitutionality of the statute providing therefor by declaring it was evidential only and did not impair any substantive rights. Be that as it may, we shall here adopt the reasoning of most federal tribunals and *treat the physician-patient privilege as substantive for Erie purposes . . . .*[74]

Substantive treatment of the privilege has been established by subsequent Mississippi federal diversity cases.[75]

B. Medical Persons Within the Privilege

The privileged communications statute immunizes only those communications "made to a physician or surgeon by a patient under his charge."[76] Given the strict construction of the statute,[77] a question arises as to what class of healers fall within the definitions of "physician" and "surgeons."

(1923). *But see* Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 274, 192 So. 577, 577 (1940) (questioning the breadth of the patient privilege statute).

[71] *See* United States v. Harper, 450 F.2d 1032, 1035 (5th Cir. 1971) (no medical privilege in federal criminal cases).

[72] 304 U.S. 64 (1938).

[73] 309 F. Supp. 1234 (N.D. Miss. 1970).

[74] *Id.* at 1237 (emphasis added) (footnote omitted) (citing Massachusetts Mutual Life Ins. Co. v. Brei, 311 F.2d 463 (2d Cir. 1962) (medical privilege is substantive or quasi-substantive)).

[75] *E.g.*, Pritchard v. Insurance Co. of N. America, 61 F.R.D. 104, 108-09 (N.D. Miss. 1973).

[76] Miss. Code Ann. § 13-1-21 (Supp. 1977).

[77] See note 67 and accompanying text *supra*.

1. "Physicians" and "Surgeons"

The Mississippi Supreme Court has stated: "A physician is defined . . . as one legally qualified and engaged in the general practice of medicine as distinguished from one likewise skilled in the art of healing who specializes in surgery, that is to say, surgeons are also physicians, and physicians may practice surgery."[78] The privilege extends only to those persons practicing medicine by virtue of a license[79] and does not apply to chiropractors,[80] osteopaths,[81] dentists,[82] veterinarians[83] or pharmacists.[84] It applies not only to the patient's personal physician but also to outside specialists called in by the patient's doctor[85] and to each doctor of a group practice if the patient is treated or examined by one of the group.[86] Where the patient is seen by more than one physician at different times, or for unconnected reasons, he may waive the privilege as to one and assert it as to the others.[87]

2. Nurses

Nurses who overhear confidential communications while assisting a doctor or observing treatment also come within the privilege.[88] But what a nurse may observe or be told by a patient when not assisting a doctor is not privileged,[89] and the same is true for student nurses neither assisting nor in the employ of a doctor.[90]

A recently enacted Mississippi statute allows specified types of

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[78] Joyner v. State, 181 Miss. 245, 252, 179 So. 573, 576 (1938).

[79] *See* MISS. CODE ANN. § 73-25-1 (1972) (a physician must be licensed). For a definition of "the practice of medicine," see *id.* § 73-25-33.

[80] Kress Co. v. Sharp, 156 Miss. 693, 704, 126 So. 650, 653 (1930).

[81] T. MCELROY, MISSISSIPPI EVIDENCE § 142, at 436 (1955).

[82] Gulf, M. & N.R.R. v. Willis, 171 Miss. 732, 739, 157 So. 899, 901 (1934).

[83] EVIDENCE HANDBOOK, *supra* note 1, at 184.

[84] *Id.*

[85] Provident Life & Accident Ins. Co. v. Chapman, 152 Miss. 747, 758, 118 So. 437, 439 (1928).

[86] Mississippi Power & Light Co. v. Jordan, 164 Miss. 174, 184, 143 So. 483, 485 (1932).

[87] Brookhaven Lumber Mfg. Co. v. Adams, 132 Miss. 689, 698, 97 So. 484, 486 (1923).

[88] Mississippi Power & Light Co. v. Jordan, 164 Miss. 174, 185, 143 So. 483, 485 (1932). "[W]here information and knowledge of a nurse are gained by being present and assisting a physician in treatment and hearing communications between the physician and patient, then her testimony would be [privileged], for the reason that it is part of the knowledge of the physician himself." *Id.* at 185-86, 143 So. at 485.

[89] *Id.* at 186, 143 So. at 486. "[A] nurse is not a privileged witness as to what she sees or learns in her contact with patients, or as to communications made to her by patients . . . ." *Id.* at 185, 143 So. at 485; *accord*, Goodman v. Lang, 158 Miss. 204, 209, 130 So. 50, 51 (1930).

[90] Life & Cas. Co. v. Walters, 180 Miss. 384, 391-92, 177 So. 47, 48-49 (1937).

emergency treatment by mobile intensive care paramedics maintaining direct voice contact with either a doctor or a registered nurse authorized by a doctor.[91] If a paramedic renders emergency treatment under specific orders and instructions from a doctor through direct voice contact, it would seem that the privilege should attach since the paramedic is in essence an agent or extension of the doctor.[92] However, where the paramedic acts under directions of a registered nurse alone, even though the procedure has been authorized by a doctor, the privilege should not apply[93] unless a doctor is present and also in direct voice contact.

3. Psychiatrists and Psychologists

The medical privilege under the statute applies to psychiatrists[94] except in insanity proceedings[95] or where the psychiatrist is court-appointed.[96] A more recent statute also brings psychologists within the scope of the privilege.[97] Of course, the privilege applies only to psychologists licensed by statute[98] and to those communications made in the course of professional employment. It is clear, therefore, that the communication must relate to consultation due to "an infirmity of a psychic or psychosomatic nature, *i.e.*, one generally recognized as susceptible to psychotherapeutic treatment."[99]

It has been suggested that the psychologist-patient privilege bears a stronger resemblence to the priest-penitent privilege[100] than to the physician-patient privilege because secrecy of communications is geared

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[91] MISS. CODE ANN. § 41-60-9 (Supp. 1977).

[92] *Cf.* Mississippi Power & Light Co. v. Jordan, 164 Miss. 174, 185, 143 So. 483, 486 (1932) (nurse rendering aid under a doctor's orders is an agent of the doctor and the privilege applies).

[93] *Cf.* Life & Cas. Ins. Co. v. Walters, 180 Miss. 384, 177 So. 47, 48-49 (1937) (medical privilege inapplicable to nurse not assisting doctor).

[94] *See* Tarrants v. State, 236 So. 2d 360, 366 (Miss. 1970) (defendant who put psychiatrist on stand waived privileged communication statute), *cert. denied*, 401 U.S. 920 (1971). *See generally* R. SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATIONS ch. 5 (1966).

[95] MISS. CODE ANN. §§ 41-21-67 to -75 (Supp. 1977).

[96] Rogers v. State, 222 Miss. 690, 696-98, 76 So. 2d 831, 833 (1955).

[97] A psychologist shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall a psychologist's secretary, stenographer or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

MISS. CODE ANN. § 73-31-29 (1972).

[98] *Id.* §§ 73-31-13, -19 (1972).

[99] 47 NW. U.L. REV. 384, 387 (1952). For a definition of the "practice of psychology," see MISS. CODE ANN. § 73-31-3 (1972). See note 102 *infra*.

[100] See section VII. *infra*.

less toward protecting the profession than toward assuring confidentiality to the patient.[101] This analogy appears reasonable since the psychologist is a nonmedical practitioner, and the priest or minister occasionally performs functions similar to those of the psychologist.[102] For this reason the authors suggest that interpretations of the psychologist's privilege should parallel those applied to the priest-penitent privilege.

C. *The Physician-Patient Relationship*

The privilege attaches to communications made by a patient under his doctor's charge "or by one seeking professional advice."[103] It is therefore unnecessary that the doctor actually treat the patient[104] or receive a fee.[105] So long as the doctor is consulted for the purpose of diagnosis or treatment the privilege applies, regardless of whether he is actually employed.[106] It is generally held that a doctor consulted by a patient's physician also falls within the privilege by becoming an "agent" of the patient's own doctor. This is so even though the relationship of physician-patient cannot technically exist when the doctor was never consulted by the patient himself.[107]

A physician's knowledge of his patient obtained outside the professional relationship is not privileged.[108] Yet, if a doctor cannot adequately separate his personal knowledge of a patient's injuries or condition from what he learns in a professional capacity, the privilege attaches to his testimony.[109] Futhermore, no physician-patient relationship exists as to court-appointed doctors.[110] It has also been held that the testimony of a

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[101] 47 NW. U.L. REV. 384, 386 (1952). *See generally* Louisell, *The Psychologist in Today's Real World* (pt. 2), 41 MINN. L. REV. 731, 743-44 (1957).

[102] *See* MISS. CODE ANN. § 73-31-3 (1972) ("'Practice of psychology' is the application of principles of learning, motivation, perception, thinking, and emotional relationships . . . .").

[103] *Id.* § 13-1-31 (Supp. 1977).

[104] Welch, *supra* note 58, at 148.

[105] *Id.; see* Provident Life & Accident Ins. Co. v. Chapman, 152 Miss. 747, 759, 118 So. 437, 440 (1928) (immaterial whether fee paid or charged).

[106] EVIDENCE HANDBOOK, *supra* note 1, at 183; *see* Hardy v. Riser, 309 F. Supp. 1235, 1239 (N.D. Miss. 1970) (privilege arises in professional context with a purpose of treatment). *But cf.* Hopkins v. State, 212 Miss. 772, 773-74, 55 So. 2d 467, 467 (1951) (privilege does not extend to court-appointed physician); Smith v. State, 188 Miss. 339, 344, 194 So. 922, 923 (1940) (same).

[107] Provident Life & Accident Ins. Co. v. Chapman, 152 Miss. 747, 758-59, 118 So. 437, 439-40 (1928). See notes 85 through 87 and accompanying text *supra*.

[108] Estes v. McGeehee, 133 Miss. 174, 178-79, 97 So. 530, 531-32 (1923); Keeton v. State, 175 Miss. 631, 650, 167 So. 68, 72 (1936). See notes 124 through 127 and accompanying text *infra*.

[109] Mississippi Power & Light Co. v. Jordan, 164 Miss. 174, 185, 143 So. 483, 485 (1932).

[110] *See, e.g.*, Rogers v. State, 222 Miss. 690, 696-97, 76 So. 2d 831, 833 (1955) (court-

victim's doctor is not privileged in a criminal case,[111] presumably because no confidential relationship exists between the accused and his victim's doctor.

Where the party asserting the medical privilege fails to show the existence of the doctor-patient relationship, his objection should be overruled;[112] a party's physician is competent to testify where no confidential relationship is shown to exist.[113] It is the trial judge, and not the doctor-witness, who finally determines whether the evidence sought emanates from the professional relationship.[114] However, the court has stated that "wherever the circumstances are such that the relation [of physician-patient] can reasonably and consistently be held to exist, that view of the case will be taken."[115]

D. What Communications Are Privileged

Generally, all knowledge obtained by the doctor in a professional capacity or by mere examination falls within the definition of "communications" for purposes of the privilege.[116] This broad rule encompasses information unrelated to the injuries which are the subject of the lawsuit,[117] as well as nonmedical observations by the doctor, *e.g.*, the clothing worn by the patient or articles on his person.[118] Although a patient's doctor can be called to the stand by the opposite party,[119] he may not be asked about any communications or, if he examined the patient, what the examination revealed.[120] Even matters which would be observable and recognized by ordinary laymen but are known only to the doctor, such as sobriety, are privileged.[121] Also protected are nonpublic hospital records[122] and records or X-rays made by the treating physi-

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appointed psychiatrist). See notes 128 through 130 and accompanying text *infra*.

[111] Maddox v. State, 173 Miss. 799, 805, 163 So. 449, 450 (1935).

[112] Keeton v. State, 175 Miss. 631, 651, 167 So. 68, 72 (1936).

[113] Sproles v. State, 176 Miss. 810, 812, 170 So. 293, 293 (1936).

[114] Dabbs v. Richardson, 137 Miss. 789, 807, 102 So. 769, 771 (1925).

[115] Norwood v. State, 158 Miss. 550, 553, 130 So. 733, 733 (1930).

[116] Yazoo & M.V.R.R. v. Messina, 109 Miss. 143, 150-52, 67 So. 963, 965-66 (1915), *rev'd on other grounds sub nom.*, Illinois Cent. R.R. v. Messina, 240 U.S. 395 (1916); Welch, *supra* note 58, at 148, 151.

[117] New Orleans & N.E.R.R. v. Shows, 240 Miss. 604, 608, 128 So. 2d 381, 382 (1961).

[118] *See* Yazoo & M.V.R.R. v. Decker, 150 Miss. 621, 639-40, 116 So. 287, 291-92 (1928) (bottle of liquor in patient's pocket).

[119] Gulf, M. & O.R.R. v. Smith, 210 Miss. 768, 777, 50 So. 2d 898, 901 (1951).

[120] *Cf.* Sproles v. State, 176 Miss. 810, 812, 170 So. 293, 293 (1936) (physician allowed to deny that he had treated defendant over defendant's privilege objection).

[121] Yazoo & M.V.R.R. v. Decker, 150 Miss. 621, 639-40, 116 So. 287, 291-92 (1928); *see* Goodman v. Land, 158 Miss. 204, 209, 130 So. 50, 51 (1930) (nurse's testimony concerning intoxication admissible since nurses are not covered by privilege statute).

[122] Miss. Code Ann. § 41-9-67 (1972).

cian—or someone under his charge—for use in treatment.[123]

A doctor's knowledge of his patient acquired by casual association and observation is not privileged.[124] Testimony of this nature is, of course, nonexpert.[125] A patient's physician may, however, at the opposing party's instance, give expert testimony based on hypothetical questions formed from admitted and unprivileged evidence as to the condition or injuries of his patient.[126] As long as he does not reveal facts learned from observing or treating the patient, this expert testimony does not waive the privilege.[127]

A doctor appointed by the court to undertake an examination may testify as to his observations of and communications made by the patient.[128] Although the court has referred to this situation as a "waiver" of the privilege,[129] the better view is that the privilege never arose since the confidential relationship cannot exist where the function of the doctor is to provide information to third persons.[130]

A somewhat different theory is advanced to allow testimony of doctors appointed under federal rule 35.[131] The rule provides for a court-ordered examination of a party for good cause shown by the opponent whenever the mental or physical condition of a party is in issue in a federal diversity action.[132] A doctor who examines a party pursuant to rule 35 is not considered the party's "physician" within the medical privilege and may therefore testify as to what his examination reveals.[133] It has been suggested, however, that the privilege may be used to forestall a motion for a rule 35 examination if the party-plaintiff can convince the federal judge that his "discretion serves as a protection to a party whose feelings or reputation might be injured by an unwarranted

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[123] Tonkel v. Yazoo & M.V.R.R., 170 Miss. 321, 329, 154 So. 351, 353 (1934). See notes 140 & 141 and accompanying text *infra*.

[124] Keeton v. State, 175 Miss. 631, 650-51, 167 So. 68, 72 (1936); Watkins v. Watkins, 142 Miss. 210, 239, 106 So. 753, 759 (1926); Estes v. McGeehee, 133 Miss. 174, 178, 97 So. 530, 531 (1923). See notes 108 & 109 and accompanying text *supra*.

[125] Estes v. McGeehee, 133 Miss. 174, 178, 97 So. 530, 531-32 (1923) (dictum).

[126] Provident Life & Accident Ins. Co. v. Chapman, 152 Miss. 747, 758, 118 So. 437, 439 (1928); Watkins v. Watkins, 142 Miss. 210, 240, 106 So. 753, 759 (1926).

[127] Provident Life & Accident Ins. Co. v. Chapman, 152 Miss. 747, 758, 118 So. 437, 439 (1928).

[128] United States v. Harper, 450 F.2d 1032, 1035 (5th Cir. 1971); Williamson v. State, 330 So. 2d 272, 275 (Miss. 1972). See note 110 and accompanying text *supra*.

[129] Bulter v. State, 245 So. 2d 605, 606-07 (Miss. 1971).

[130] See note 110 and accompanying text *supra*.

[131] FED. R. CIV. P. 35.

[132] Warrick v. Brode, 46 F.R.D. 427, 428 (D. Del. 1969); Leach v. Greif Bros. Cooperage Corp., 2 F.R.D. 444, 446 (S.D. Miss. 1942); Barnette, *Compulsory Medical Examination Under the Federal Rules*, 41 VA. L. REV. 1059, 1064 (1959).

[133] Hardy v. Riser, 309 F. Supp. 1234, 1242 (N.D. Miss. 1970).

disclosure, and thus tends to serve the purpose for which the physician-patient privilege was originally created."[134] It is the authors' opinion that this discretion should be exercised by the judge only in rare circumstances where the examination would truly serve no purpose.

Apparently, the rule that communications made to a court-appointed doctor are not privileged also extends to examinations arranged by law enforcement officials. In *Norwood v. State*,[135] the defendant voluntarily underwent a physical examination at the sheriff's request several hours after his arrest. The court ruled that the examining doctor could testify, stating:

> [W]here a person is examined by a physician at the instance or with the approval of officers of the law for purposes of law enforcement, and when the person so examined then and there knows, or the facts are such as to reasonably give knowledge that the examination is solely for the purpose aforesaid, and no illegal or otherwise wrongful means are used to secure the examination or inspection, the [medical privilege] statute is not available.[136]

Finally, any medical information required by law to be made a public record is not privileged since such information lacks confidentiality.[137] Therefore, documents such as vital statistics, which are prepared by a patient's doctor but are filed for public record, are admissible[138] and become prima facie evidence when properly certified.[139] The same rule applies to hospital records required by law, such as the records of state mental hospitals[140] and charity hospitals.[141]

E. Use at Trial

1. Generally

An erroneous denial of the privilege by the trial judge has been held to be "palpable error."[142] Still, before an objection can be sustained, the party invoking the medical privilege has the burden of showing that the physician-patient relationship exists,[143] and that a "communication"

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[134] *Id.* at 1241.
[135] 158 Miss. 550, 130 So. 733 (1930).
[136] *Id.* at 553, 130 So. at 733.
[137] Life & Cas. Ins. Co. v. Walters, 180 Miss. 384, 394, 177 So. 47, 49-50 (1937).
[138] *Id.*, 177 So. at 49.
[139] Miss. Code Ann. § 13-1-97 (1972).
[140] Motley v. State, 174 Miss. 568, 576, 165 So. 296, 298 (1936).
[141] Reynolds v. West, 237 Miss. 613, 618, 115 So. 2d 742, 743-44 (1959).
[142] Hamel v. Southern Ry., 113 Miss. 344, 356, 74 So. 276, 277 (1917).
[143] Hopkins v. State, 212 Miss. 772, 774, 55 So. 2d 467, 468 (1951).

was made[144] to a "physician" or "surgeon" by a person seeking medical attention.[145]

The Mississippi Supreme Court has on one occasion erroneously labelled a treating physician as an incompetent witness.[146] Nevertheless a later case[147] states the better rule that the defendant may offer the plaintiff's physician, or vice-versa, as a witness since the patient may waive the privilege by his failure to object.[148] To be effective, a privilege objection must be specific enough to allow the trial judge to separate admissible testimony from the inadmissible; otherwise he will be justified in overruling the objection.[149]

Although it has been held that the trial court should not hear any privileged information once the objection has been raised, even in the absence of the jury,[150] such a rule prevents a proffer of the desired testimony into the record. Therefore, the supreme court has suggested that a record of the offered testimony be made by filing a bill of exceptions which states what was sought to be proved.[151] This rule does not preclude the defendant from calling a specific doctor to impeach the plaintiff's testimony merely as to his treatment by that doctor for a particular injury.[152]

Since the medical privilege is for the sole benefit of the patient, only he, as the aggrieved party against whom the privileged information is allowed into evidence, may complain on appeal.[153]

2. The Inference Instruction

In Mississippi when a party whose physical injuries are the basis for expected remuneration in a suit fails to call his doctor to substantiate the claimed injuries, his opponent is entitled to a jury instruction to that

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[144] Welch, *supra* note 58, at 149.

[145] *Id.; accord*, Keeton v. State, 175 Miss. 631, 651, 167 So. 68, 72 (1936).

[146] Tonkel v. Yazoo & M.V.R.R., 170 Miss. 321, 329, 154 So. 351, 353 (1934).

[147] Gulf, M. & O.R.R. v. Smith, 210 Miss. 768, 50 So. 2d 898 (1951).

[148] *Id.* at 777, 50 So. 2d at 901.

[149] *See* Keeton v. State, 175 Miss. 631, 651, 167 So. 68, 72 (1936) (privilege objection is insufficient when made to matters not entirely barred by the privilege and the judge is unable to separate privileged from nonprivileged testimony).

[150] Powell v. J.J. Newman Lumber Co., 174 Miss. 685, 696, 165 So. 299, 301-02 (1936); United States Fidelity & Guar. Co. v. Hood, 124 Miss. 548, 571, 87 So. 115, 119 (1921). However, in Donaldson v. Life & Cas. Ins. Co., 239 Miss. 635, 641-43, 124 So. 2d 701, 704 (1960), the court held that questioning a party's doctor in the absence of the jury is harmless error where the physician's testimony is buttressed by unprivileged facts admitted into evidence.

[151] Powell v. J.J. Newman Lumber Co., 174 Miss. 685, 694, 165 So. 299, 301-02 (1936).

[152] Sproles v. State, 176 Miss. 810, 812-13, 170 So. 293, 293 (1936).

[153] Vance v. State, 182 Miss. 840, 860-61, 183 So. 280, 284 (1938).

effect. Furthermore, the jury should be instructed that it may reasonably infer that the doctor, if called, would have testified adversely to his patient's interests.[154] Allowing the jury to draw such an unfavorable inference is based on a quid pro quo theory grounded in the opponent's inability to exercise his right to question a material witness—the plaintiff's doctor.[155]

Before a party is entitled to the inference instruction, it must be clear that there was no waiver of the privilege by the plaintiff prior to trial which would have enabled the defendant either to call the doctor as a witness or to conduct pretrial discovery.[156] If the plaintiff has effectively waived the privilege, no inference instruction is warranted since a waiver gives the defendant access to the doctor's testimony equal with the plaintiff.[157]

A difficulty arises where the plaintiff, for obvious tactical reasons, waives the privilege immediately prior to or during the trial. In this way a plaintiff who perhaps never planned to call his treating physician to testify might attempt to defeat his opponent's right to the inference instruction. Moreover, since a waiver of the privilege makes the physician equally available to the defendant, the plaintiff may attempt to seize the opportunity for turning the inference back against the defendant. This can be done by implying that because the defendant failed to call the doctor, it is likely that the doctor's testimony would have been unfavorable to the defendant's case.[158]

Mere waiver of the privilege in the above circumstances, however, does not always defeat the defendant's right to the inference instruction

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[154] *E.g.*, Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 275, 192 So. 577, 580 (1940); Robinson v. Haydel, 177 Miss. 233, 247, 171 So. 7, 9 (1936); Beard v. Williams, 172 Miss. 880, 883-84, 161 So. 750, 751 (1935).

[155] Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 275, 192 So. 577, 580 (1940). Thus, where a plaintiff fails to call a doctor whom he has consulted for the injuries which are at issue in the suit, and the doctor is otherwise available to testify, his opponent may imply to the jury that the doctor, if called by the plaintiff, would have given unfavorable testimony with regard to the injuries. *See, e.g., id.*, 192 So. at 581 (upholding instruction of unfavorable inference where plaintiff called only two of the three doctors who had examined him). The defendant might be able to establish his right to the instruction during cross-examination of plaintiff by asking if the doctor is present and able to testify. The trial judge can refuse to allow defendant to call the doctor himself for this purpose. *See* Gulf Ref. Co. v. Myrick, 220 Miss. 429, 436, 71 So. 2d 217, 219 (1954) (sustaining trial court's refusal to allow defendant to call plaintiff's physician since the unfavorable inference instruction was sufficient).

[156] *See* City of Bay St. Louis v. Johnston, 222 So. 2d 841, 844 (Miss. 1969) (notice of waiver to defendant five days before trial precluded right to instruction).

[157] *Id.*

[158] *See generally* Bryan Bros. Packing Co. v. Grubbs, 251 Miss. 52, 60, 168 So. 2d 289, 292 (1964).

in Mississippi. The test for determining whether or not an inference instruction should be granted when the privilege is waived immediately prior to or during a trial is stated in *Clary v. Breyer*:[159] "Both the sincerity of the tender [*i.e.*, waiver] and its legal efficacy must remain in direct ratio to the feasibility of compliance [*i.e.*, defendant's opportunity to examine the plaintiff's doctor]."[160] Thus, for a waiver to be "effective" and the inference unavailable, the defendant must be afforded a reasonable time and present right to call and examine the plaintiff's doctor.[161] For example, five days before the trial in *City of Bay St. Louis v. Johnston*,[162] the plaintiff's attorney waived by letter the medical privilege as to out-of-state doctors who treated the plaintiff for injuries received in an auto collision.[163] The defendant neither filed a motion for a continuance nor sought to depose the doctors.[164] The court held that under these circumstances the defendant was not entitled to an inference instruction because the doctors were available for subpoena or discovery.[165] In *Gatlin v. Allen*,[166] however, the plaintiff waived the privilege during the trial, knowing that his doctor was out of town and unavailable to testify.[167] The court allowed the defendant an inference instruction, stating:

> [A]n effectual waiver must make reasonably and readily available not only the testimony but the physical presence of the attending physician. Surely a mere gesture of consent must rise above that which is only theatrical, whereby a token privilege is tendered to a defendant who is, to the knowledge of plaintiff, unable to avail of it. Such maneuver would shield the patient against any inferences deducible from failure to call an important witness available only to him, and merely unseal the lips of a physician whose voice could not be heard.[168]

Similarly, even though a plaintiff who voluntarily displays his injuries to the jury waives the privilege,[169] the waiver is not effective for purposes of defeating a defendant's right to the inference instruction if his doctors

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[159] 194 Miss. 612, 13 So. 2d 633 (1943).

[160] *Id.* at 622, 13 So. 2d at 635.

[161] Dennis v. Prisock, 254 Miss. 574, 584, 181 So. 2d 125, 128-29 (1965); Gatlin v. Allen, 203 Miss. 135, 140, 33 So. 2d 304, 305 (1948).

[162] 222 So. 2d 841 (Miss. 1969).

[163] *Id.* at 844.

[164] *Id.*

[165] *Id.*

[166] 203 Miss. 135, 33 So. 2d 304 (1948).

[167] *Id.* at 140, 33 So. at 306.

[168] *Id.*, 33 So. 2d at 305-06. The court went on to affirm a decision for the plaintiff, however, since the defendant's proposed instruction was defectively worded. *Id.*, 33 So. 2d at 306.

[169] Reid v. Middleton, 241 Miss. 324, 327-28, 130 So. 2d 554, 555 (1961).

are neither reasonably nor presently available.[170]

If the privilege is waived during trial, the defendant should be prepared to show that the doctor is not reasonably available and that his presence cannot be "procured without unreasonable delay or discomfiture to the court."[171] Otherwise the plaintiff will be deemed to have made an effectual waiver, and the defendant will not be entitled to the instruction.[172]

The inference instruction should be drafted to allow the jury to make a "reasonable inference."[173] A study of the cases will reveal particular instructions that the supreme court has approved or disapproved,[174] but generally an instruction should include: (1) an assertion that the defendant could not introduce the privileged communications; (2) a brief explanation of the privilege; and (3) the fact that the jury may

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[170] *Id.* at 328, 130 So. 2d at 555.

[171] Clary v. Breyer, 194 Miss. 612, 621-22, 13 So. 2d 633, 635 (1943).

[172] *Id.*

[173] Gatlin v. Allen, 203 Miss. 135, 140, 33 So. 2d 304, 306 (1948).

[174] In Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 192 So. 577 (1940), the court approved a jury instruction to the effect that the defendant

> could not introduce as a witness any doctor to testify to anything learned by him of the plaintiff's physical condition while the relation of physician and patient existed between him and plaintiff, . . . and the fact that [plaintiff] failed to produce as a witness one of his physicians . . . would justify the jury in inferring that his testimony would have been unfavorable to the [plaintiff].

Id. at 271, 192 So. at 578. However, the attorney should use caution in drafting the inference instruction since the court later found that an instruction on "presumption" rather than "inference" went further than the instruction approved in *Killings*. Gatlin v. Allen, 203 Miss. 135, 140-41, 33 So. 2d 304, 306 (1948).

Another instruction approved by the court reads as follows:

> The Court instructs the jury for the defendants that under the law of Mississippi the communications between a physician and his patient are privileged where the relationship of doctor and patient exists, and that the plaintiff has a legal right under the statute to claim that privilege, and object to the doctor giving testimony acquired by virtue of that relationship, however, the Court instructs you where the plaintiff has claimed such privilege, then you may reasonably infer therefrom that had the doctor testified that his testimony would be adverse to the interest of the plaintiff."

Reid v. Middleton, 241 Miss. 324, 327, 130 So. 2d 554, 555 (1961). For other instructions approved by the court, see Craighead v. Operating Cab Co., 220 Miss. 336, 340, 70 So. 2d 878, 879 (1954); Robinson v. Harydel, 177 Miss. 233, 247, 171 So. 7, 9 (1936).

The court has held that an inference instruction which does not allow for a "reasonable" inference but attempts instead to impose an absolute rule is improper. Gatlin v. Allen, 203 Miss. 135, 140, 33 So. 2d 304, 305-06 (1948). Nor should the instruction be drafted to imply that the defendant has no right at all to call the plaintiff's doctor since the doctor is a competent witness. Rather, the instruction should go to preclusion of the doctor's testimony because of its privileged nature. Gulf, M. & O.R.R. v. Smith, 210 Miss. 768, 776-77, 50 So. 2d 898, 901 (1951).

reasonably infer that the doctor's testimony would have been adverse to the plaintiff.[175]

In addition to the inference that the treating physician's testimony would have been unfavorable to the plaintiff if introduced, there is authority that the defendant can obtain a different inference where the plaintiff attempts to establish by his own testimony the existence of an injury. If the extent of the injury can be determined only by expert medical testimony, and prior to trial the plaintiff had access to a physician, then the jury may reasonably infer that if the injuries had indeed been serious the plaintiff would have called a physician to testify, and that the physician's testimony, if produced, would have been adverse to the plaintiff's claim.[176]

F. Waiver

The statute provides that a waiver of the medical privilege may be effected only at the instance of the patient or, if the patient is deceased, by either his personal representative, his legal heirs, or the proponents and opponents of his will.[177] Although it was formerly thought that there could be no implied waiver,[178] this apparently is not the modern rule. Such a waiver results when the patient's conduct is deemed to have waived his right to assert the privilege.[179] Whether or not there is an implied waiver, however, depends upon the degree of detail volunteered by the plaintiff in reference to communications between him and his doctor.[180] There is no implied waiver, for example, when the plaintiff merely testifies to the treatment prescribed by his doctor without divulging communications.[181] Likewise, questioning the patient about privileged matters on cross-examination does not effect an intentional waiver which would allow defendant to call plaintiff's doctor as a wit-

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[175] See note 174 *supra*.

[176] *See* Beard v. Williams, 172 Miss. 880, 884, 161 So. 750, 751 (1935) (approving such an instruction by defendant).

[177] MISS. CODE ANN. § 13-1-21 (Supp. 1977).

[178] 2 MISS. L.J. 244, 245 (1930); *see* Coca-Cola Bottling Works v. Simpson, 158 Miss. 390, 396, 130 So. 479, 480 (1930) (requiring knowledge of the existence of the medical privilege for an effective waiver).

[179] Welch, *supra* note 58, at 159.

[180] Metropolitan Life Ins. Co. v. Evans, 183 Miss. 859, 870, 184 So. 426, 427 (1938); Welch, *supra* note 58, at 157-58; *cf.* Coca-Cola Bottling Works v. Simpson, 158 Miss. 390, 397, 130 So. 479, 481 (1930) (dictum) (voluntary testimony regarding privileged matter constitutes waiver).

[181] Bryan Bros. Packing Co. v. Grubbs, 251 Miss. 52, 60, 168 So. 2d 289, 292 (1964). *But cf.* Pullin v. Nabors, 240 Miss. 864, 872, 128 So. 2d 117, 120 (1961) (harmless error to allow physician to testify over plaintiff's objection where plaintiff had introduced evidence concerning physician's prescription).

ness.[182] This rule has been extended to depositions of the patient's doctor taken prior to trial.[183] The authors feel, however, that this is a faulty rule since the patient's attorney is or should be well aware that privileged information is being revealed. A timely objection would prevent unfairness to the defendant who, having learned of facts possibly material to his defense, is prevented later from using the information previously divulged without objection.

The plaintiff does waive the privilege when he places his doctor on the stand[184] or when he testifies to any communications between himself and the doctor concerning his injuries and treatment thereof.[185] "Where a patient voluntarily goes into detail regarding the nature of [the] injuries and either testifies as to what the particular physician did or said while in attendance, or relates what [was] communicated to the physician, the privilege is waived, and the adverse party may examine the physician."[186] The patient-party cannot partially waive the privilege,[187] and if he testifies even to "fragmentary parts of communications," he waives the privilege as to all communications with that doctor.[188]

Whenever a party voluntarily submits himself to his adversary's physician in an attempt to establish his claim for damages, the privilege is waived as to that doctor since the results are intended for the adversary's use.[189] It would appear, however, that the privilege never existed in the first place since in those circumstances no confidential relationship was ever reposed.[190]

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[182] Coca-Cola Bottling Works v. Simpson, 158 Miss. 390, 397, 130 So. 479, 481 (1930).

[183] Hill v. Stewart, 209 So. 2d 809, 812-13 (Miss. 1968). Before a deposition can be introduced, however, there must be an express and intentional waiver. *Id.*

[184] Knighton v. Knighton, 253 So. 2d 846, 847 (Miss. 1971); *cf.* Tarrants v. State, 236 So. 2d 360, 366 (Miss. 1970) (criminal defendant who put his psychiatrist on the stand waived the privilege), *cert. denied*, 401 U.S. 920 (1971).

[185] Dennis v. Prisock, 254 Miss. 574, 584, 181 So. 2d 125, 128 (1965).

[186] *Id.* at 584, 181 So. 2d at 128.

[187] Coca-Cola Bottling Works v. Simpson, 158 Miss. 390, 396-97, 130 So. 479, 480-81 (1930).

[188] *Id.* (dictum).

[189] Metropolitan Life Ins. Co. v. Evans, 183 Miss. 859, 869-70, 184 So. 426, 427 (1938).

[190] *Cf.* notes 110 & 128 through 130 and accompanying text *supra* (court-appointed physicians). Nevertheless, where it appears that the examination is for the benefit of a third person, there is a waiver as to the results. *See* Butler v. State, 245 So. 2d 605, 606 (Miss. 1971) (psychiatric examination for the benefit of the state). In keeping with this reasoning, a physician who examines a party pursuant to a court order under FED. R. CIV. P. 35 may testify. 4A MOORE'S FEDERAL PRACTICE ¶ 35.03[1], at 35-14 (2d ed. 1975). See note 133 and accompanying text *supra*. Note that rule 35(b)(2) provides that the medical privilege as to all other doctors is waived if the examined party requests a copy of the court-appointed physician's report. *Id.*, ¶ 35.07, at 35-35. Where an unrequested copy of the report is delivered to the examined party, however, there is no waiver. Hardy v. Riser, 309 F. Supp. 1234, 1236 (N.D. Miss. 1970).

If a plaintiff voluntarily displays his injuries to the jury, "the portion of his body so exhibited becomes an exhibit in the case, like any other object or thing introduced."[191] In Mississippi he waives not only the medical privilege as to the doctor or doctors who treated him for the injury[192] but also the "inviolability" of his person.[193] Unlike the procedure under rule 35 available to a federal plaintiff, a party in a Mississippi state court cannot compel his opponent to undergo a medical examination prior to trial because of the doctrine of inviolability of the person.[194] But where a party voluntarily displays or exhibits to the jury those parts of his body which are allegedly injured and are the subject of the suit, then he has waived the inviolability of his person and his opponent is entitled to require him to undergo a reasonable court-ordered examination by a physician of the opponent's choice.[195] The examination so ordered may be used "to explain, criticize, or impeach [the displayed injury's] value as evidence, and to that end have it examined by experts."[196] Although it may be reversible error to refuse the defendant's motion for a physical examination of the plaintiff after he has waived the inviolability of his person by displaying his injuries to the jury,[197] the judge is not required to grant the motion where the proposed examination would cause an unreasonable delay of trial.[198]

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[191] Dixie Greyhound Lines, Inc. v. Matthews, 177 Miss. 103, 115, 170 So. 686, 688 (1936) (quoting Holton v. Janes, 25 N.M. 374, 183 P. 395, 396 (1919)).

[192] Dennis v. Prisock, 254 Miss. 574, 583-84, 181 So. 2d 125, 128 (1965); *cf.* Dixie Greyhound Lines, Inc. v. Matthews, 177 Miss. 103, 116, 170 So. 686, 688-90 (1936) (plaintiff waived inviolability of the person privilege by exhibiting scars to jury).

[193] Dixie Greyhound Lines, Inc. v. Matthews, 177 Miss. 103, 116, 170 So. 686, 688-90 (1936); *cf.* Dennis v. Prisock, 254 Miss. 574, 583-84, 181 So. 2d 125, 128 (1965) (plaintiff waived physician-patient privilege by exhibiting scars to jury).

[194] Dixie Greyhound Lines, Inc. v. Matthews, 177 Miss. 103, 116-17, 170 So. 686, 690 (1936) (Ethridge, J., dissenting); Gentry v. Gulf & S.I.R.R., 109 Miss. 66, 72, 67 So. 849, 850 (1915); Yazoo & M.V.R.R. v. Robinson, 107 Miss. 192, 195-96, 65 So. 241, 241 (1914).

[195] Reid v. Middleton, 241 Miss. 324, 328, 130 So. 2d 554, 556 (1961); Metropolitan Life Ins. Co. v. Evans, 183 Miss. 859, 870, 184 So. 426, 427 (1938); Teche Lines, Inc. v. Bounds, 182 Miss. 638, 648, 179 So. 747, 749 (1938); Dixie Greyhound Lines, Inc. v. Matthews, 177 Miss. 103, 116, 170 So. 686, 690 (1936). However, a display made pursuant to an opponent's questioning during cross-examination may not be "voluntary" for purposes of waiver. See note 182 and accompanying text *supra*.

[196] Dixie Greyhound Lines, Inc. v. Matthews, 177 Miss. 103, 115, 170 So. 686, 688 (1936). In this case one party exhibited his injuries to the jury together with X-rays. The court held that the opposing party could compel the injured party to undergo a new X-ray examination to impeach those X-rays previously admitted into evidence. *Id.* at 117, 170 So. at 689-90.

[197] Reid v. Middleton, 241 Miss. 324, 328, 130 So. 2d 554, 555-56 (1961).

[198] Dixie Greyhound Lines, Inc. v. Matthews, 177 Miss. 103, 118, 170 So. 686, 690 (1936). The injured party is allowed to have his physician and attorney present at any such examination. *Id.*

Does the plaintiff, by putting one doctor on the stand, thereby waive the privilege as to all other physicians who have treated him for the injuries at issue? Some Mississippi Supreme Court justices have felt so,[199] but the general rule appears to be that there is no general waiver when the plaintiff, without more, introduces only one of several doctors who treated him for the same ailment.[200] Should one doctor's testimony rely on reports and records of prior doctors and records, however, then there is a waiver as to those doctors and records.[201] Cross-examination can be used to effectuate a waiver by revealing that the doctor has used reports, letters, opinions or findings of another doctor in arriving at his opinion.[202] Allowing one of the plaintiff's physicians to testify while leaving the privilege intact for all others with respect to the same injury appears enigmatic, however, in light of the aim of protecting the patient. If he allows one doctor to publish his maladies to the world, why should the courts rush to protect other such testimony? Once injuries are intentionally allowed to be aired by one doctor, the purpose of the privilege is no longer fulfilled,[203] and the plaintiff's privacy no longer needs protection. It would seem that evenhanded justice should require that all other doctors who have seen the plaintiff for that injury be amenable to questioning by the defendant; after all, a deceitful plaintiff may shop endlessly for doctors until he finds one who will go along with his feigned injury. Nor could waiver in these circumstances harm the genuinely injured plaintiff who will have no fear of hiding the truth of his real injuries from the jury.

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[199] See Keeton v. State, 175 Miss. 631, 648, 167 So. 68, 71 (1936) (Anderson, J.); *cf.* Yazoo & M.V.R.R. v. Messina, 111 Miss. 884, 889, 72 So. 779, 781 (1916) (Stevens, J., dissenting) (physician's testimony waives privilege as to other physicians testifying on the same matter).

[200] Hill v. Stewart, 209 So. 2d 809, 813 (Miss. 1968).

[201] Knighton v. Knighton, 253 So. 2d 846, 847 (Miss. 1971); *cf.* City of Laurel v. Upton, 253 Miss. 380, 381-93, 175 So. 2d 621, 625 (1965) (waiver only as to the particular reports).

This rule may appear questionable in comparison with that of Hill v. Stewart, 209 So. 2d 809 (Miss. 1968). In *Hill*, the only doctor called by the plaintiff testified from previous records of other doctors who saw the decedent. *Id.* at 811. The defendant did not assert the principle in the *Knighton* case as grounds for waiver but relied instead on the theory that calling one treating physician waived the privilege as to all other treating physicians. This argument was, of course, rejected by the court. *Id.* at 813. From this view *Hill* and *Knighton* are not inconsistent.

[202] *See* City of Laurel v. Upton, 253 Miss. 380, 393, 175 So. 2d 621, 624-25 (1965) (cross-examination of physician effected waiver of privilege of previous reports). Nevertheless, the mere fact that a physician corresponds with other physicians who previously treated the patient does not effect a waiver. *See* Dennis v. Prisock, 221 So. 2d 706, 711 (Miss. 1969) (question of whether physician corresponded with other physicians was proper in order to determine upon whose examination the expert opinion was based).

[203] Keeton v. State, 175 Miss. 631, 648, 167 So. 68, 71 (1936); Illinois Cent. R.R. v. Messina, 111 Miss. 884, 889, 72 So. 779, 781 (1916) (Stevens, J., dissenting); Adam, *supra* note 58, at 254.

Merely bringing a suit in which the existence of an injury is an issue does not constitute a waiver of the privilege.[204] One Mississippi justice, as the author of a majority opinion, expressed his independent view—ultimately rejected by the majority's holding—that an implied waiver results whenever a person files suit in a personal injury action.[205] The Mississippi State Bar has endorsed this position and at one time advocated its adoption in a proposed Mississippi Civil Procedure Act.[206] Again, the more solid rationale is that when a patient files suit as to his condition and injuries, the purpose of the privilege—protection of the patient—is no longer served, and a waiver occurs.[207]

A contractual waiver supported by consideration is an effective waiver of the medical privilege in Mississippi,[208] whether it be found in an insurance contract[209] or in the form of a waiver provision in an insurance application to be incorporated into the policy and enforced by consideration.[210] It is well established, however, that a gratuitous waiver of the privilege may be revoked by the patient as long as he is not estopped from doing so.[211] The classic case on this point is *Pritchard v. Insurance Co. of North America*,[212] where the plaintiff sued for accidental death benefits under her deceased husband's life insurance policy. Upon filing for the benefits and on the advice of her attorney, she signed an authorization allowing the insurance company to obtain medical information from the decedent's physicians.[213] Two physicians questioned by the company were of the opinion that the decedent's death was not accidental, and the company denied liability on the strength of those opinions.[214] The decedent's wife filed suit whereupon the company sought to depose the two physicians, asserting that the signature on the

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[204] United States Fidelity & Guar. Co. v. Hood, 124 Miss. 548, 571-72, 87 So. 115, 119 (1921).

[205] Keeton v. State, 175 Miss. 631, 649, 167 So. 68, 71 (1936) (Anderson, J., expressing a personal view).

[206] Proposed Mississippi Civil Procedure Act § 35 (1944), *reprinted in* Lipscomb, *supra* note 56, at 189 n. 38.

[207] Welch, *supra* note 58, at 160.

[208] Pritchard v. Insurance Co. of N. America, 61 F.R.D. 104, 108 (N.D. Miss. 1973); Fornea v. Goodyear Yellow Pine Co., 181 Miss. 50, 65-66, 178 So. 914, 918 (1937); New York Life Ins. Co. v. Burris, 174 Miss. 658, 672-73, 165 So. 116, 120 (1936); Sovereign Camp, Woodmen of the World v. Farmer, 116 Miss. 626, 645, 77 So. 655, 656 (1917).

[209] Pritchard v. Insurance Co. of N. America, 61 F.R.D. 104, 108 (N.D. Miss. 1973); New York Life Ins. Co. v. Burris, 174 Miss. 658, 672-73, 165 So. 116, 120 (1936).

[210] Leach v. Millers Life Ins. Co., 400 F.2d 179, 181-82 (5th Cir. 1968).

[211] Pritchard v. Insurance Co. of N. America, 61 F.R.D. 104, 109 (N.D. Miss. 1973); Coca-Cola Bottling Works v. Simpson, 158 Miss. 390, 396-97, 130 So. 479, 481 (1930).

[212] 61 F.R.D. 104 (N.D. Miss. 1973).

[213] *Id.* at 106.

[214] *Id.* at 107.

authorization had effectively waived the medical privilege. When the plaintiff revoked her authorization and moved to quash the depositions,[215] the court sustained her motion on the grounds that

> waiver of the statutory medical privilege affects substantial rights, and is not merely formal or procedural in nature, and, therefore, must be supported by an agreement founded on a valuable consideration. Since the elements of both consideration and estoppel are lacking, plaintiff's revocation of the medical authorizations she executed must be respected and her claim of medical privilege upheld.[216]

One troublesome revocation issue concerns estoppel, which can preclude revocation of the waiver. To establish estoppel, one must ordinarily show that his position has changed in reliance on the conduct of another and that he has been damaged as a result.[217] If a party gratuitously waives the privilege and his opponent avails himself of or acts upon the waiver to obtain privileged information that substantiates his position, then it would be prejudical to the opponent to deny his use of the information.

The waiver of the medical privilege with respect to those hospital records which are not required to be kept by law was recently addressed in *Young v. Madison County General Hospital.*[218] The court held that "reasonable access" to hospital records by a patient as authorized by statute[219] will be allowed only where the patient or his representative personally appears at the hospital and, after a showing of "good cause," requests the records.[220]

> [C]areful investigation must be made and . . . great caution . . . must be exercised before doctors and hospitals authorize the inspection and release of the medical and hospital records of patients . . . . The treating doctor or hospital is under a heavy duty and responsibility to thoroughly check the credentials of the person or organization requesting access to a patient's records and to determine the specific record desired.[221]

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[215] *Id.* at 107-08.

[216] *Id.* at 109. Revocation of waiver was also recognized in Coca-Cola Bottling Works v. Simpson, 158 Miss. 390, 130 So. 479 (1930), where the plaintiff, on cross-examination, consented to opposing counsel's request that he waive the privilege. The Mississippi Supreme Court ruled plaintiff could successfully reassert it when counsel attempted to question his doctor. *Id.* at 397, 130 So. at 481.

[217] *E.g.*, Crowe v. Fotiades, 242 Miss. 422, 443-44, 80 So. 2d 478, 486 (1955).

[218] 337 So. 2d 931 (Miss. 1977).

[219] Miss. Code Ann. § 41-9-65 (1972).

[220] 337 So. 2d at 932-34.

[221] *Id.* at 933-34.

G. Actions in Which Privilege is Inapplicable

The privilege statute in Mississippi forbids invocation of the privilege in any medical malpractice action brought after July 1, 1976.[222] Because either the proponent or opponent in any will contest may waive the privilege,[223] it may as well be said not to apply in those proceedings. Other proceedings from which use of the privilege has been excised by statute are commitment proceedings for alcoholism or drug addiction,[224] insanity proceedings,[225] and workmen's compensation hearings.[226] Although the privilege has been applied in criminal proceedings,[227] this application has been questioned.[228]

H. Discovery

The Mississippi Discovery Act[229] and federal rule 26(b)(1)[230] both allow discovery of any matter not privileged.[231] Rules of privilege apply to discovery in the same manner as they do at trial.[232] A party objecting to a discovery motion on the ground of privilege has the burden of showing the privilege exists[233] unless it is evident from the face of the documents.[234]

A party can have interrogatories quashed or obtain a protective order when the interrogatories seek privileged matter,[235] but he cannot prevent a deposition from being taken merely on the ground that privi-

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[222] MISS. CODE ANN. § 13-1-21 (Supp. 1977). The privilege remains applicable to malpractice actions brought before July 1, 1976. *Id.*

[223] *Id.*

[224] *See id.* § 41-31-5 ("all persons . . . shall have the right to appear and present evidence").

[225] *Id.* § 41-21-67.

[226] *Id.* § 71-3-15 (1972).

[227] Keeton v. State, 175 Miss. 631, 648, 167 So. 68, 71 (1936).

[228] *Id.*; Davenport v. State, 143 Miss. 121, 124-29, 108 So. 433, 433-34 (1926). *See also* Maddox v. State, 173 Miss. 799, 805, 163 So. 449, 450 (1935) (criminal defendant cannot invoke privilege to preclude physician's testimony on condition of victim).

[229] MISS. CODE ANN. § 13-1-226(b)(1) (Supp. 1976).

[230] FED. R. CIV. P. 26(b)(1).

[231] Pyle, Ott & Rumfelt, *Mississippi Rules of Discovery*, 46 MISS. L.J. 681, 686-87 (1975).

[232] *E.g.*, R. & J. Dick Co. v. Bass, 295 F. Supp. 758, 761 (N.D. Ga. 1968); Cimijotti v. Paulsen, 219 F. Supp. 621, 623 (N.D. Iowa), *appeal dismissed*, 323 F.2d 716 (8th Cir. 1963).

[233] Camco, Inc. v. Baker Oil Tools, Inc., 45 F.R.D. 384, 387 (S.D. Tex. 1968); Brown v. St. Paul City Ry., 241 Minn. 15, 62 N.W.2d 688, 701 (1954).

[234] Brown v. St. Paul City Ry., 241 Minn. 15, 62 N.W.2d 688, 701 (1954); *see* Camco, Inc. v. Baker Oil Tools, Inc., 45 F.R.D. 384, 387 (S.D. Tex. 1968) (contention that production of records would violate attorney-client privilege must be supported by facts).

[235] Sheets v. Superior Court, 257 Cal. App. 2d 1, 64 Cal. Rptr. 753, 759 (Ct. App. 1967).

leged matter will be questioned.[236] One may object to questions touching privileged matters but not to the entire deposition.[237] Although some states hold that a party's failure to make a timely objection can waive the medical privilege at a deposition,[238] such a rule apparently is not followed in Mississippi.[239]

Both the Mississippi Discovery Act[240] and federal rule 26(b)(4)[241] allow discovery of opinions of medical experts if they are consulted in anticipation of litigation or are to be called as witnesses. In federal court, rule 35[242] allows a defendant to discover through a court-appointed physician the veracity of any physical injuries claimed by a plaintiff.

I. The Medical Privilege in Federal Question Cases

Before promulgation of the Federal Standards of Evidence, the United States Court of Appeals for the Fifth Circuit had ruled that no medical privilege exists in federal question cases.[243] This rule remains true under federal standard 504[244] except in cases where a patient-psychotherapist relationship exists.[245]

J. Evaluation of the Medical Privilege in Mississippi

The authors are hard pressed to find any justification for retaining the medical privilege in Mississippi. Throughout the many years since its enactment, legal writers have called for its reform.[246] Mississippi, it should be pointed out, is the only state in the Fifth Circuit that recognizes the privilege in civil cases.[247]

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[236] *See* Spector v. Alter, 138 So. 2d 517, 517 (Fla. App. 1962) (showing of good cause is required to prevent the taking of a deposition).

[237] *Id.*

[238] *E.g.*, Schwartz v. Traveler's Ins. Co., 17 F.R.D. 330, 330 (S.D.N.Y. 1954).

[239] *See* Hill v. Stewart, 209 So. 2d 809, 812-13 (Miss. 1968) (admission of depositions held to be error despite failure to object at trial).

[240] Miss. Code Ann. § 13-1-226(b)(4) (Supp. 1977).

[241] Fed. R. Civ. P. 26(b)(4).

[242] *Id.* 35.

[243] United States v. Harper, 450 F.2d 1032, 1035 (5th Cir. 1971); *accord*, Hardy v. Riser, 309 F. Supp. 1234, 1236 (N.D. Miss. 1971).

[244] Fed. Standards of Evid. 504, Advisory Comm. Note, *reprinted in* 2 Weinstein's Evidence 504-3 (1976).

[245] Fed. Standards of Evid. 504(a)(3); Lora v. Board of Educ., 74 F.R.D. 565, 584-86 (E.D.N.Y. 1977).

[246] *See generally* Adams, *supra* note 58, at 254-55; Lipscomb, *supra* note 56, at 190; Welch, *supra* note 58, at 163. *See also* Keeton v. State, 175 Miss. 631, 648-49, 167 So. 68, 71 (1936) (Anderson, J., expressing a personal view).

[247] Hardy v. Riser, 309 F. Supp. 1234, 1236 (N.D. Miss. 1970).

The Mississippi Supreme Court itself has recognized the abuse which the medical privilege inflicts upon the opposite party.[248] In one case the court admitted that the statute "has the effect of preventing facts from being disclosed which would often be material to the administration of justice."[249] Yet, the statute remains severely entrenched.

The severest judicial criticism of the patient's privilege in Mississippi was delivered by Justice Anderson in *Keeton v. State*,[250] where he argued that: (1) the privilege should not be applied in criminal actions; (2) a plaintiff who introduces one physican waives the privilege as to all; (3) by filing a personal injury suit the plaintiff waives the privilege; and (4) application of the privilege in civil cases comes close to violating the equal protection clause.[251] Justice Anderson favored Wigmore's classic criticism of the rule:

> In the first place, the bringing of an action in which an essential part of the issue is the existence of physical ailment should be waiver of the privilege for all communications concerning that ailment. The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist. If the privilege means anything at all in its origin, it means this as a sequel . . . . The privilege . . . [is] a burlesque upon logic and justice.[252]

Still more recently, the federal district court for the Northern District of Mississippi wrote that "abuse may arise from a too-rigid application of the privilege statute."[253] To avoid such "too-rigid application" of the rule in circumstances which would create a hardship, the court might liberally recognize a waiver.

The medical privilege is not necessary for the fullest administration of justice. The court itself has implicitly underscored this theme. In *Killings v. Metropolitan Life Insurance Co.*,[254] it noted the deep-rooted bases of and necessity for the husband-wife and attorney-client privileges, as opposed to the rather late arrival of the medical privilege and its all-too-often misuse by persons willing to exaggerate their injuries.[255]

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[248] Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 274, 192 So. 577, 579 (1940).

[249] Gulf, M. & N.R.R. v. Willis, 171 Miss. 732, 739, 157 So. 899, 901 (1934).

[250] 175 Miss. 631, 167 So. 68 (1936).

[251] *Id.* at 648-49, 167 So. at 71-72.

[252] *Id.*, 167 So. at 71 (quoting 5 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2389, at 220-21 (2d ed. 1923)).

[253] Hardy v. Riser, 309 F. Supp. 1234, 1238 (N.D. Miss. 1970).

[254] 187 Miss. 265, 192 So. 577 (1940).

[255] *Id.* at 274, 192 So. at 579. *See also id.* at 278-79, 192 So. at 580-81 (Ethridge, J.,

The following is perhaps the most poignant comment on the Mississippi rule:

> The constitutions and legislatures of all the states set up courts whose function was to ferret out the truth in litigated controversies in order that justice might be achieved by the operation of law upon the facts. The legislatures of many of these same states have been occupied for over a century in promulgating rules of evidence which ham-string these courts in performing that very function. In cases involving the health or physical condition of a litigant they have sealed the lips of the physician in the very place, the court room, where justice cries out for facts.[256]

IV. The Attorney-Client Privilege

A. *The General Rule: Background and Purpose*

The rule that makes communications between lawyer and client privileged is succinctly stated by Wigmore:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.[257]

The attorney-client privilege, the oldest and most time-honored of the testimonial privileges,[258] is also the most often raised.[259] In Missis-

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specially concurring) (privileged nature of physician's communications should not prevent adverse inference instruction).

Another noteworthy problem occurs in a criminal prosecution where a defendant's doctor gives the defendant's medical history and, over objection, testifies to admissions of guilt made by the defendant. Such testimony may constitute a violation of the privilege against self-incrimination. Tarrants v. State, 236 So. 2d 360, 366-67 (Miss. 1970) (dictum), *cert. denied*, 401 U.S. 920 (1971). This question does not, however, apply to court-appointed doctors or examinations made at the instance of law enforcement officers. Norwood v. State, 158 Miss. 550, 130 So. 733 (1930). *cf.* Hardy v. Riser, 309 F. Supp. 1234, 1239 (N.D. Miss. 1970) (dictum) (court-appointed physical examination in personal injury suit is not privileged).

[256] Lipscomb, *supra* note 56, at 181.

[257] Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 342 (5th Cir. 1972), (quoting 8 J. Wigmore, *supra* note 55, § 2292, at 554). See Evidence ⚿ 77(6); Witnesses ⚿ 5, 197-206, 219(3), 292, 305.

[258] International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973); *In re* Selser, 15 N.J. 393, 105 A.2d 395, 400 (1954); Comment, *Attorney Client Confidentiality: A New Approach*, 4 Hofstra L. Rev. 685 (1976). For a thorough history of the rule, see Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 318-19 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

[259] International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973) (privilege originated contemporaneously with the right of testimonial compulsion).

sippi, the privilege is largely a matter of common law[260] since no statute explicitly provides for the exclusion of confidential communications between attorney and client.[261] However, section 73-3-37 of the Mississippi Code provides in part: "It is the duty of attorneys . . . [t]o maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients . . . ."[262] This provision has been recognized as the equivalent of a statutory attorney-client privilege.[263]

Although it is regarded as a substantive rule of law only by the federal courts,[264] the basic purpose of the rule is to encourage unrestrained communications between a lawyer and one who consults him for professional services.[265] The attorney-client privilege is to be liberally and broadly construed so as to strengthen its force and effect.[266] Subject only to narrow exceptions, the privilege survives the death of the client.[267]

B. The Professional Relationship, Confidentiality, and Presence of Third Persons

The professional relationship protected by the privilege comes into existence either when a client is rendered services by a lawyer or when he consults a lawyer with the intent of obtaining professional legal advice or services.[268] A "client" is any person, entity, or organization seeking such advice or services.[269] A "lawyer" is anyone admitted to practice law in the state where the communication was made,[270] although many

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[260] T. McELROY, *supra* note 81, § 142, at 426.

[261] Campbell, *Statutory Rules of Evidence*, in Proceedings of the 1968 Twenty-third Annual Mississippi Law Institute on Evidence 236 (1968); *see* United States v. Ladner, 238 F. Supp. 895, 896 (S.D. Miss. 1965) (exclusion of confidential communications between attorney and client is governed by Mississippi common law).

[262] MISS. CODE ANN. § 73-3-37(4) (1972).

[263] *See* McGee v. Clark, 343 So. 2d 486, 490 (Miss. 1977) (reference to attorney-client "privileged communications statute"); *accord*, Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 341 (5th Cir. 1972) (same; diversity case applying Mississippi law).

[264] *Compare* Hyde Constr. Co. v. Koehring, 455 F.2d 337, 341 (5th Cir. 1972) (federal court approach), *with* Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 274, 192 So. 577, 579 (1940) (state court approach).

[265] Crisler v. Garland, 19 Miss. (11 S. & M.) 136, 140 (1848). "[T]he privilege is founded upon a great public policy. It is adopted out of regard to the interests of justice, and from the necessity of free and unrestrained intercourse between counsel and client." *Id.*

[266] *Id.*

[267] C. MCCORMICK, *supra* note 3, § 94, at 197-98.

[268] 2 WEINSTEIN'S EVIDENCE ¶ 503(a)(1)[01], at 503-18 (1976).

[269] *Id.* at 503-17.

[270] *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 360 (D. Mass. 1950) (patent solicitors who were not members of the bar not entitled to privilege); MISS. CODE ANN. §§ 73-3-11, -25, -39 (1972) (licensing requirements).

courts extend the privilege to communications made to an attorney licensed in any state.[271]

Most legal commentators agree that confidential communications made to a person who is reasonably believed to be properly licensed to practice law in that state are privileged,[272] and such a rule has been followed by some courts.[273] It is uncertain, however, whether that rule would be followed in Mississippi, where the practice of law is defined as "[a]ny exercise of intelligent choice in advising another of his legal rights and duties."[274] It would seem reasonable, in light of the policy favoring broad implementation of the privilege in Mississippi, that communications made to a person unlicensed but offering the services described above would be privileged where the party invoking the privilege reasonably believed the consultant to be a lawyer. This is especially true in view of the policy promoting full disclosure from a client to his lawyer. Of course, whether or not the client reasonably believes the person with whom he has consulted is a lawyer must be determined on case-by-case basis.[275]

The attorney-client relationship must have existed at the time the communication was made for the privilege to apply.[276] If the lawyer has been consulted in a professional capacity and has given professional advice or rendered services, then the relationship exists[277] regardless of whether a fee has been discussed. The privilege also extends to communications made before the relationship begins if there is an intent at that time to create the relationship.[278] In marginal cases where it is difficult to determine whether the statement is actually connected with the relationship, the privilege should be found and disclosure barred.[279]

The attorney-client privilege has no application where the lawyer acts in a business, as opposed to a professional, capacity.[280] Thus, where

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[271] *See, e.g.*, Paper Converting Mach. Co. v. FMC Corp., 215 F. Supp. 249, 251 (E.D. Wis. 1963) (communication privileged so long as the attorney is licensed in another state); Georgia Pac. Plywood Corp. v. United States Plywood Corp., 18 F.R.D. 463, 465-66 (S.D.N.Y. 1956) (same).

[272] B. JONES, EVIDENCE § 21:10, at 772 (5th ed. 1958); 8 J. WIGMORE, *supra* note 55, § 2302, at 584; *accord*, FED. STANDARDS OF EVID. 503(a)(2).

[273] People v. Barker, 60 Mich. 277, 27 N.W. 539, 546 (1886); *cf.* Foster v. Buchele, 213 S.W.2d 738, 739 (Tex. Civ. App. 1948) (attorney-client privilege extends to communications made after the relationship has terminated).

[274] Darby v. Mississippi State Bd. of Bar Admissions, 185 So. 2d 684, 687 (1966).

[275] 2 WEINSTEIN'S EVIDENCE ¶ 503(a)(2)[01], at 503-23 (1976).

[276] B. JONES, *supra* note 272, § 21:10, at 773-74.

[277] Russel v. State, 185 Miss. 464, 474, 189 So. 90, 93 (1939); *see* Darby v. Mississippi State Bd. of Bar Admissions, 185 So. 2d 684, 685 (1966) (fee not necessary for action to constitute the "practice of law").

[278] B. JONES, *supra* note 272, § 21:10, at 774.

[279] *Id.*, § 21:9, at 770.

[280] 2 WEINSTEIN'S EVIDENCE ¶ 503(a)(1)[01], at 503-21 (1976).

the lawyer is hired merely as an agent for the client[281] or is consulted merely as a scrivener[282] the privilege does not attach. Where the only communication is the giving of a land description, contract terms, or terms of a deed or mortgage, and no legal opinion is sought in their connection, the communication is not privileged because the lawyer is merely putting into legal form the agreements of the parties.[283]

To be privileged, a communication must be made in confidence, involving a lawyer's advice "emanating from an attorney-client relationship."[284] Since the client must intend for the communication to be confidential,[285] those communications between attorney and client made in the presence of third persons are not privileged because the confidentiality is presumed to be destroyed.[286] However, if the presence of the third person, such as a spouse, is necessary under the circumstances, the privilege is not destroyed.[287] Even communications overheard by eavesdroppers are not privileged[288] unless the client has taken reasonable precautions to prevent the matter from being overheard.[289]

The privilege extends to statements made in the presence of persons who are under the lawyer's immediate supervision and are essential to the lawyer's rendition of services, such as clerks and secretaries.[290] Statements made between agents of both the lawyer and the client, when made in the regular course of professional services, are privileged just

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[281] EVIDENCE HANDBOOK, *supra* note 1, at 180.

[282] Randall v. Yates, 48 Miss. 685, 689 (1873).

[283] Rogers v. State, 266 So. 2d 10, 20 (Miss. 1972); Randall v. Yates, 48 Miss. 685, 689 (1873).

[284] Rogers v. State, 266 So. 2d 10, 20 (Miss. 1972).

[285] B. JONES, *supra* note 272, § 21:9, at 770.

[286] Turnipseed v. Drummond, 217 Miss. 129, 137-38, 63 So. 2d 536, 539 (1953); Nebhan v. Mansour, 162 Miss. 418, 428, 139 So. 166, 167 (1932); Perkins v. Guy, 55 Miss. 153, 181 (1877); *see* Taylor v. State, 285 So. 2d 172, 176 (Miss. 1973) (third person disclosure of overheard communications).

> In order that the privileged communications rule between attorney and client shall apply, it is necessary that the consultations be confidential. Therefore, if they take place in the presence of a third person, the relationship is not confidential, and is not entitled to protection of the rule. The very nature of the transaction, and the circumstances surrounding it, are inconsistent with the idea that the consultations were intended to be confidential.

Nebhan v. Mansour, 162 Miss. 418, 428, 139 So. 166, 167 (1932).

[287] C. MCCORMICK, *supra* note 3, § 91, at 189. However, the presence of a family member other than a spouse destroys the confidentiality. Gordon v. Robinson, 109 F. Supp. 106, 107 (W.D. Pa. 1952), *rev'd on other grounds,* 210 F.2d 192 (3d Cir. 1954); Marshall v. Marshall, 140 Cal. App. 2d 475, 295 P.2d 131, 134 (Dist. Ct. App. 1956).

[288] EVIDENCE HANDBOOK, *supra* note 1, at 178.

[289] 2 WEINSTEIN'S EVIDENCE ¶ 503(a)(4)[02], at 503-30 (1976).

[290] Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 40 (D. Md. 1974). *But cf.* Wilburn v. Williams, 193 Miss. 831, 837-38, 11 So. 2d 306, 307 (1943) (privilege may not extend to stenographer).

as though they had been made directly to the lawyer.[291] In addition, an attorney's consultation with an expert is privileged if made for the purposes of trial preparation and not for purposes of testifying.[292] Confidential communications between co-counsel or two law firms representing the same client are also privileged[293] as are communications between house counsel and field counsel in multistate settings.[294]

One exception to the rule of liberal application is legal malpractice, where the privilege has no application.[295] If a lawyer brings suit against a former client, however, and the issues in the suit are substantially related to the former representation, the suit may be dismissed because of the serious ethical issues raised by the lawyer's advocating interests adverse to those of his former client[296] in violation of canon 4.[297]

As a general rule, the privilege does not apply where an attorney represents both parties to an action with regard to a particular transaction.[298] This issue, however, is not well settled in Mississippi. In *Turnipseed v. Drummond*,[299] the court adopted the following rule:

> By selecting the same attorney, each party waives his right to place those communications under the shield of professional confidence. Either party may introduce testimony concerning the same as against the other, or his heirs or representatives. . . . Thus, if two or more persons consult an attorney at law for their mutual benefit, and make statements in his presence, he may disclose those statements in any controversy between them or their personal representatives or successors in interest.[300]

Yet, one year later in *Frierson v. Mississippi Road Supply Co.*,[301] the court held that where one party's attorney prepares a bill of sale under instructions for another party, he becomes the second party's lawyer with regard to the preparation of the instrument, and his relation to that

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[291] 1 ALI Basic Problems of Evidence 100 (1954).

[292] B. Jones, *supra* note 272, § 21:15, at 786; *see* City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26, 31 (1951) (theory of agency).

[293] Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 45 (D. Md. 1974).

[294] Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 344 (5th Cir. 1972); Valente v. Pepsico, Inc., 68 F.R.D. 361, 367 (D. Del. 1975); Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 42 (D. Md. 1974).

[295] Evidence Handbook, *supra* note 1, at 181.

[296] Cannon v. United States Acoustic Corp., 398 F. Supp. 209, 222 (N.D. Ill. 1975). *See also* ABA Code of Professional Responsibility Canon 9, which provides: "A lawyer should avoid even the appearance of professional impropriety."

[297] ABA Code of Professional Responsibility Canon 4 provides: "A lawyer should preserve the confidences and secrets of a client."

[298] Evidence Handbook, *supra* note 1, at 180.

[299] 217 Miss. 129, 63 So. 2d 536 (1953).

[300] *Id.* at 138, 63 So. 2d at 539.

[301] 221 Miss. 804, 75 So. 2d 70 (1954).

party regarding the instrument is also privileged.[302] The "joint representation" exclusion was not mentioned, nor was the *Drummond* decision cited. It is clear, however, that *Drummond* states the more widely recognized rule on the matter of joint representation[303] and is more definite on the matter than *Frierson*, which appears to be an aberration of the general rule.

C. *Subject Matter of the Privilege*

The extent to which the privilege protects communications between the lawyer and his client varies according to the court. While some courts limit the privilege to the client's communications to the lawyer,[304] Mississippi extends the privilege to all communications passed between lawyer and client in the course of the professional relationship.[305] The latter is the better rule since an attorney's communication to his client often reveals the substance of the client's communication.[306]

The attorney-confidential communications statute[307] states that a lawyer is not to reveal the "secrets" of his client. Although just what the term "secrets" encompasses has never been addressed in Mississippi, at least one court has looked to the definition in disciplinary rule 4-101[A] of the Code of Professional Responsibility,[308] which defines a client's "secrets" as "other information gained in the professional relationship

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[302] *Id.* at 809, 75 So. 2d at 72.

[303] *See generally* LaRocca v. State Farm Ins. Co., 47 F.R.D. 279, 280 (W.D. Pa. 1969); Popovitch v. Kasperlik, 70 F. Supp. 376, 381 (W.D. Pa. 1947); EVIDENCE HANDBOOK, *supra* note 1, at 180; 8 J. WIGMORE, *supra* note 55, § 2312, at 603-10. An attorney who closes a loan may testify to facts concerning the transaction if he acted for both parties. Cappaert v. Bierman, 339 So. 2d 1355, 1358 (Miss. 1976).

[304] *See, e.g.*, United States v. International Bus. Mach. Corp., 66 F.R.D. 154, 168-78 (S.D.N.Y. 1974) (documents prepared by lawyers not privileged). *See also* PA. CONS. STAT. ANN. tit. 28, § 321 (Purdon 1958) (attorney-client privilege limited to confidential communications).

[305] *E.g.*, Jones v. State, 65 Miss. 179, 183, 3 So. 379, 380 (1888). In Lengsfield & Co. v. Richardson, 52 Miss. 443 (1876), the court defined the scope of the privilege:

> [T]he rule requires that the entire professional intercourse between client and attorney, whatever it may have consisted in, should be protected by profound secrecy. The exemption is not confined to advice given or opinions stated; it extends to facts communicated by the client—all that passes between client and attorney in the course and for the purpose of the business.

Id. at 447 (citation omitted).

[306] 1 ALI BASIC PROBLEMS OF EVIDENCE 101 (1954); 8 J. WIGMORE, *supra* note 55, § 2302, at 584.

[307] MISS. CODE ANN. § 73-3-37 (1972). See text accompanying note 262 *supra*.

[308] City of Wichita v. Chapman, 214 Kan. 575, 521 P.2d 589, 595-96 (1974). The relationship between the ethical canons and the attorney-client privilege is almost inseparable. *Cf. In re* Franklin Washington Trust Co., 1 Misc. 2d 697, 148 N.Y.S.2d 731, 733-34 (App. Term, Sup. Ct. 1956) (attorney-client privilege limited to confidential communications).

that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[309] This definition contrasts with that of the "confidences" of a client, which are referred to in the same section as information ordinarily protected by the attorney-client privilege.[310]

The privilege thus extends to all communications made in the professional relationship, including acts, oral and written statements, letters, opinions, signs and papers.[311] Although the privilege does not apply where the lawyer acts merely as a scrivener, it does extend to situations where the lawyer is consulted about drafting an instrument, where communications are made concerning the object and purpose of the instrument, and where legal advice is sought and given on the subject.[312] Information gathered or prepared by experts, not in preparation for trial but in aid of the lawyer's rendition of legal service, is also privileged.[313] Although the more common rule is that testimentary communications made to a lawyer are privileged only during the client's life,[314] Mississippi has held that they remain so even after the client's death.[315]

Regardless of the fact that much of what an attorney learns is privileged matter, he is not an incompetent witness. He may be called to testify to facts surrounding any transaction so long as he does not divulge communications protected by the privilege.[316] The lawyer may also testify to matters of public record and statements made by his client in a former trial so long as he does not reveal confidential matters.[317] The privilege likewise has no application to communications concerning compromise settlements which ultimately fail in performance, because communications to lawyers in this regard are made with the intent that they be conveyed to the other party.[318] Additionally, a client's physical condition and state of mind are not covered by the privilege.[319] Notwithstanding the unprivileged nature of the foregoing

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[309] ABA CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule 4-101[A].

[310] *Id.*

[311] *See* Perkins v. Guy, 55 Miss. 153, 178 (1877) (an attorney cannot reveal his client's opinions, statements or disclosures); Parkhurst v. McGraw, 24 Miss. 134, 138 (1852) (it is an attorney's duty to maintain all confidential communications); EVIDENCE HANDBOOK, *supra* note 1, at 179.

[312] Crisler v. Garland, 19 Miss. (11 S. & M.) 136, 139 (1848).

[313] San Francisco Unified School Dist. v. Superior Court, 55 Cal. 2d 451, 359 P.2d 925, 927, 11 Cal. Rptr. 373, 375 (1961).

[314] 8 J. WIGMORE, *supra* note 55, § 2314, at 612.

[315] Smith v. Smith, 185 Miss. 702, 716, 188 So. 305, 308 (1939).

[316] McGee v. Clark, 343 So. 2d 486, 490 (Miss. 1977);Ferrell v. State, 208 Miss. 539, 542, 45 So. 2d 127, 129 (1950).

[317] United States v. Cochran, 546 F.2d 27, 29 (5th Cir. 1977).

[318] *E.g.*, Baum v. Denn, 187 Or. 401, 211 P.2d 478, 480 (1949).

[319] B. JONES, *supra* note 272, § 21:17, at 791.

matters, courts view the voluntary testimony of a lawyer against his client with a hostile eye. In *Parkhurst v. McGraw*,[320] the Mississippi Supreme Court stated:

> [The lawyer] appears to have been a willing witness in disclosing matters certainly committed to him in professional confidence; and a lawyer who is thus faithless in one of the first and highest obligations to his client, ought to receive but little credit as a witness, when he voluntarily gives his evidence, without intimating the manner in which he acquired his information.[321]

Although the privilege does not run to a client's identity, address, or facts and terms of the lawyer's employment,[322] such information may gain privileged status where the information is passed only for the purpose of allowing the attorney to communicate with his client[323] or where compelling disclosure would betray a confidential communication.[324]

D. The Corporate Lawyer

Although Mississippi has no case dealing with the corporate attorney-client privilege, much has been written on the subject.[325] A corporation can generally assert the attorney-client privilege.[326] Since the corporation "speaks" only through its agents, however, establishing which of the corporate agents are covered is the key to establishing and maintaining the privilege.[327]

Three tests have been used to isolate privileged agents. The most common is the "control group" test, which extends the privilege to

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[320] 24 Miss. 134 (1852).

[321] *Id.* at 141.

[322] United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973); Behrens v. Hironimus, 170 F.2d 627, 628 (4th Cir. 1948); Harris v. State, 281 Ala. 622, 206 So. 2d 868, 871 (1968). *See generally* Annot., 16 A.L.R.3d 1047, 1051-53 (1967).

[323] Annot., 16 A.L.R.3d 1047, 1062 (1967).

[324] NLRB v. Harvey, 349 F.2d 900, 904-05 (4th Cir. 1965); *Ex parte* Enzor, 270 Ala. 254, 117 So. 2d 361, 363-65 (1960). The Fifth Circuit has recently recognized such a qualified privilege. *In re* Grand Jury Proceeding, 517 F.2d 666, 671 (5th Cir. 1975), *noted in* 27 MERCER L. REV. 1213 (1976).

[325] *E.g.*, 2 WEINSTEIN'S EVIDENCE ¶ 503(b)[04], at 503-38 to -48 (1976); Maurer, *Privileged Communications and the Corporate Counsel*, 28 ALA. LAW. 352 (1967); O'Neal & Thompson, *Vulnerability of the Professional-Client Privilege in Shareholder Litigation*, 31 BUS. LAW. 1775 (1976); Schaeffer, *The Attorney Client Privilege in the Modern Business Corporation*, 20 BUS. LAW. 989 (1965).

[326] Bell v. Maryland, 378 U.S. 226, 263 (1964); Garner v. Wolfinbarger, 430 F. 2d 1093, 1097, 1097 n.10 (5th Cir.), *cert. denied*, 401 U.S. 974 (1971); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 322-23 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963); Hasso v. Retail Credit Co., 58 F.R.D. 425, 428 & 428 n.4 (E.D. Pa. 1973); 8 In 1 Pet Prods., Inc. v. Swift & Co., 218 F. Supp. 253, 253-54 (S.D.N.Y. 1963).

[327] O'Neal & Thompson, *supra* note 325, at 1789-90.

communicants within the group of persons authorized to make decisions for the corporation and who can take action for it upon the attorney's advice.[328] The second test disregards the technical approach of the "control group" test, favoring an ad hoc inquiry to determine "whether, under all the relevant circumstances . . . the employees concerned may be thought to have acted as representatives of the client for purposes of recognizing the privilege."[329] A third test, still criticizing the "control group" test as inadequate, makes privileged those communications by an employee sufficiently identified with the corporation, which are made at the direction of his superiors and deal with the performance of the employee's duties.[330] The three tests are not exclusive, and some courts use a combination.[331] Whatever test is used, the communicant must always be in privity with the corporation, and the subject matter must deal with the attorney's representation of the company.[332]

For the privilege to be ruled applicable, the corporation must show that the communication was "1) not disseminated beyond those with the need to know and 2) was intended primarily for the ears of the attorney and 3) was made for the purpose of obtaining legal services for the corporation."[333] Because the attorney-client privilege belongs to the corporate "client," a communicant who is within the control group, or whose communications to the corporate lawyer are otherwise privileged, may not assert the privilege to refuse to answer questions regarding those communications if the corporation as an entity has waived the privilege.[334] If the corporate officer is seeking personal legal advice, then

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[328] *E.g.*, Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 35-36 (D. Md. 1974) (substantial participation in decision making process); City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa.) (actual authority in decision making process), *mandamus & prohibition denied sub nom.*, General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); O'Neal & Thompson, *supra* note 325, at 1789-90. *See generally* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 360 (D. Mass. 1950); D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 388 P.2d 700, 709-10, 36 Cal. Rptr. 468, 477 (1964); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970).

[329] Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 40 (E.D.N.Y. 1973).

> [W]here the dominant purpose of the communication is to facilitate the rendition of legal services to the client, and the communication itself or the substance thereof is transmitted to the lawyer shortly thereafter, the fact that the communication, at its inception, is within the corporate structure rather than directly with the attorney does not automatically defeat the privilege.

Id. at 39.

[330] Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971).

[331] *See* Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 35-37 (D. Md. 1974) (utilization of different approaches).

[332] B. JONES, *supra* note 272, § 21:11, at 778.

[333] 2 WEINSTEIN'S EVIDENCE ¶ 503(b)[04], at 503-48 (1976).

[334] *In re* Jackier, 434 F. Supp. 648, 649-50 (E.D. Mich. 1977).

the privilege may apply,[335] but if the communication is made while the lawyer is acting in his capacity as legal counsel for the company, the privilege belongs to the corporation and not to the communicant.[336]

Attendance by the attorney at a corporate meeting does not automatically render communications at the meeting privileged,[337] especially if the lawyer serves on the board of directors or in a management position.[338] For such communications to be privileged, they must relate "to the acquisition or rendition of professional legal services and must have retained a confidential character."[339] Knowledge obtained by corporate house counsel as part of the corporate structure, as opposed to his professional capacity, is not privileged,[340] nor is his business, or non-legal, advice to the corporation.[341] The privilege may be relaxed in shareholder litigation, particularly in cases involving oppression of minority shareholders.[342]

For corporate documents to be protected by the privilege, they must have been prepared for the purpose of lawyer-client consultation.[343] Merely filing such documents in the corporation's general files, however, may destroy the privilege which initially attached.[344] Similarly, documents made in the ordinary course of business are not privileged, even if legal advice is rendered with regard to the document[345] or it is used in preparation for a case.[346] Of course, such documents may be protected

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[335] *Id.*

[336] *Id.*

[337] International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973).

[338] *See* Federal Savings & Loan Ins. Corp. v. Fielding, 343 F. Supp. 537, 545-46 (D. Nev. 1972) (communication not privileged where corporate directors were former partners and present associates of law firm representing corporation); *cf.* United States v. Vehicular Parking, Ltd., 52 F. Supp. 751, 753-54 (D. Del. 1943) (privilege not accorded to documentary communication made by an attorney advising on business matter while acting as corporate director). *See also* Schaefer, *supra* note 325, at 995.

[339] International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973).

[340] United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 360-61 (D. Mass. 1950); *See generally* B. JONES, *supra* note 272, § 21:11, at 778.

[341] Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 794 (D. Del. 1954); O'Neal & Thompson, *supra* note 325, at 1792-93; Note, *supra* note 328, at 428.

[342] *See* Valente v. Pepsico, Inc., 68 F.R.D. 361, 369 (D. Del. 1975) (documents concerning duties owed to minority shareholders prepared by attorneys for majority shareholders are not privileged). *See generally* 2 WEINSTEIN'S EVIDENCE ¶ 503(b)[05], at 503-48 to -51; O'Neal & Thompson, *supra* note 325.

[343] Goodgame, *Corporations and the Lawyer-Client Privilege*, 51 CAL. ST. B.J. 119, 123 (1976).

[344] O'Neal & Thompson, *supra* note 325, at 1791.

[345] Goodgame, *supra* note 343, at 123.

[346] O'Neal & Thompson, *supra* note 325, at 1779. If a document contains information primarily intended to be communicated to a corporate executive, the mere fact that an

as work product,[347] as trade secrets, or as confidential commercial information.[348]

A corporation's lawyer should never assume that a document will be privileged when litigation arises.[349] Rather, he should advise his client to periodically clean out its files of unneeded documents[350] and suggest that certain officers in the corporation be designated beforehand as the sole communicants with the lawyer to prevent dissemination of the communication.[351] In addition, a document should be stamped "Lawyer-Client Privileged" before filing it away to prevent any speculation about its character.[352]

E. Use at Trial

The existence of a lawyer-client relationship does not of itself give rise to a presumption that the information sought is privileged.[353] When a lawyer is called to the stand to testify, and the privilege invoked, the party seeking the privilege has the burden of proving the existence of the relationship and extent of the privileged matter.[354] Qualification of the lawyer to testify once the privilege has been raised should be outside the presence of the jury.[355] It is for the court, not the lawyer, to determine whether the matter is privileged.[356] If the court sustains the objection, the party seeking the evidence must make an offer of proof or the matter will not be considered on appeal.[357] On the other hand, if the court erroneously allows the testimony, and the facts to which the lawyer testifies

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attorney's name is "copied" on the document will not bring it under the privilege. United States v. Aluminum Co. of America, 193 F. Supp. 251, 253 (N.D.N.Y. 1960).

[347] *See* section V. *infra.*

[348] *See* FED. R. CIV. P. 26(c) ("the court . . . may make [an] order . . . that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way . . . .").

[349] Goodgame, *supra* note 343, at 163-64.

[350] *Id.* at 163.

[351] *Id.*

[352] *Id.*

[353] *E.g.*, Vance v. State, 190 Tenn. 521, 230 S.W.2d 987, 990 (1950); *see, e.g.*, Collette v. Sarrasin, 184 Cal. 283, 193 P.2d 571, 573 (1920) (burden is on the party claiming the privilege to prove confidential relationship).

[354] *E.g.*, United States v. Hankins, 424 F. Supp. 606, 613 (N.D. Miss. 1976); Collette v. Sarrasin, 184 Cal. 283, 193 P. 571, 573 (1920).

[355] *See* Smith v. Smith, 185 Miss. 702, 716, 188 So. 305, 308 (1939) (attorney's qualifications should be established before the transaction in question is brought to the jury's attention).

[356] International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D.Fla. 1973).

[357] *See* Fortenberry v. Herrington, 188 Miss. 735, 749, 196 So. 232, 237 (1940) (no reversal in will contest where no offer of proof followed objection).

are proved by other competent witnesses, harmless error has been committed.[358]

When a lawyer is called to the stand, whether or not his client is a party to the action he must refuse to testify to privileged communications unless he has obtained prior consent from his client.[359] Not only does the lawyer have an ethical duty under the disciplinary rules to refuse to disclose such matters,[360] but in Mississippi he also has a statutory duty to do so.[361] If the court erroneously orders the lawyer to testify after he has asserted the privilege in a case where his client is a party, then the lawyer must answer or be held in contempt. His only recourse in such a case is the possibility of a reversal on appeal.[362] If the client is not a party, the lawyer's duty to assert the privilege remains; if the judge demands the testimony, however, he should answer since he has done his duty by objecting.[363] A recent Mississippi federal district court opinion suggests, however, that a lawyer who refuses to testify must show that the client desires to invoke the privilege.[364] A lawyer may testify against a former client, but the practice has been termed "distasteful" to the courts and "should only be used in rare instances."[365]

A client may assert the privilege as a witness whether or not he is a party to the lawsuit. If he is not a party and is required to divulge privileged matters, the party against whom the evidence is received may not be allowed to complain on appeal.[366] Finally, the failure of a party to call his lawyer affords no right for his opponent to obtain an inference instruction such as that which accompanies the medical privilege.[367]

F. Waiver

Only the client, as the holder of the privilege, may waive it.[368] He

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[358] Lengsfield & Co. v. Richardson, 52 Miss. 443, 451-52 (1876).

[359] Hunter v. Kenney, 77 N.M. 336, 422 P.2d 623, 624-25 (1967); B. JONES, *supra* note 272, § 21:9, at 766; EVIDENCE HANDBOOK, *supra* note 1, at 180.

[360] ABA CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule 4-101(A); *accord*, Comment, *Confidential Information Under the Code of Professional Responsibility—Canon 4*, 79 DICK. L. REV. 650, 652 (1975).

[361] MISS. CODE ANN. § 73-3-37 (1972).

[362] *See Ex parte* Lipscomb, 111 Tex. 409, 239 S.W. 1101, 1103 (1922) (contempt proper regardless of trial court's erroneous ruling).

[363] Sedler & Simeone, *supra* note 8, at 3.

[364] United States v. Hankins, 424 F. Supp. 606, 613 (N.D. Miss. 1976).

[365] United States v. Cochran, 546 F.2d 27, 29 n.5 (5th Cir. 1977).

[366] *See generally* 1 ALI BASIC PROBLEMS OF EVIDENCE 105 (1954).

[367] *See* Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 273, 192 So. 577, 579 (1940) (fair administration of justice demands that the attorney-client privilege be placed above inferences).

[368] C. MCCORMICK, *supra* note 3, § 93, at 194. A trustee in bankruptcy may waive the

does not waive the privilege by merely testifying in his own behalf[369] or by testifying to facts which generally deal with the subject of consultation with the lawyer.[370] Waiver may occur, however, if the client is not timely in asserting the privilege,[371] testifies as to the communications,[372] or expressly or impliedly—as without objection—allows his lawyer to testify.[373] Some states hold that a waiver may also result from the protected party's deposing a party to the relationship,[374] but a federal district court in Mississippi has ruled that waiver cannot result from the "mere taking of a discovery deposition under the Federal Rules."[375] Once the privilege is waived by the client, the attorney is bound by his client's action.[376]

A waiver of a part of the privileged matter is a waiver of the entirety,[377] so that the client who testifies as to a part of the communication waives the privilege as to the whole subject.[378] An exception to the partial waiver rule results, however, when a partial disclosure is made to the opposite party during settlement negotiations. In that situation, only the information disclosed is waived.[379] Finally, a waiver at one stage of trial is a waiver for all stages.[380] Consistent with the partial waiver

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privilege on behalf of the bankrupt. Weck v. District Court, 161 Colo. 384, 422 P.2d 46, 48 (1967).

[369] Jones v. State, 65 Miss. 179, 183, 3 So. 379, 380 (1888).

[370] International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973).

[371] *See* Balozinski v. Lebid, 65 N.J. 483, 168 A.2d 209, 215 (1961) (waiver of privilege by failure to enter timely objection); B. JONES, *supra* note 272, § 21:2, at 746 (same).

[372] Jones v. State, 65 Miss. 179, 183-84, 3 So. 379, 380 (1888).

> The reason for maintaining such privileges ceases, when one has voluntarily exposed himself by his own testimony, to the very consequences from which it was intended by the privilege to protect him. To preserve such privilege in such case would be worse than vain, for while it could not help the witness, it might, by withholding the only means of contradicting and impeaching him, operate with the greatest injustice towards the party on trial.

Id at 184, 3 So. at 380.

[373] EVIDENCE HANDBOOK, *supra* note 1, at 180.

[374] *See* Tibado v. Brees, 212 So. 2d 61, 62-63 (Fla. App. 1968) (waiver of husband-wife privilege).

[375] Dexter v. United States, 306 F. Supp. 415, 423 (N.D. Miss. 1973).

[376] B. JONES, *supra* note 272, § 21:22, at 802.

[377] Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 46 (D. Md. 1974); American Optical Corp. v. Medtronic, Inc., 56 F.R.D. 426, 432 (D. Mass. 1972).

[378] International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 186 (M.D. Fla. 1973). By introducing one part of his correspondence with the lawyer, the client waives the privilege as to all such correspondence. *Id.* at 186. "[A] party may not insist upon the protection of the privilege for damaging communications while disclosing other selected communications because they are self-serving." *Id.* at 185.

[379] American Optical Corp. v. Medtronic, Inc., 56 F.R.D. 426, 431 (D. Mass. 1972); International Bus. Mach. Corp. v. Sperry Rand Corp., 44 F.R.D. 10, 13 (D. Del. 1968).

[380] 1 ALI BASIC PROBLEMS OF EVIDENCE 108 (1954); *see* Love v. United States, 386 F.2d

rule, the privilege, once waived in one context, may not be asserted in another to protect the communication from disclosure.[381]

Waiver of the attorney-client privilege should be intentional and not effected through an inadvertent disclosure.[382] Mississippi does, however, recognize implied waiver. For example, a request that the lawyer attest a will prepared by him waives the privilege which attached to the drafting and execution of the will.[383] Waiver by implication can also occur as a matter of law if it can be shown that the privileged matter was affirmatively used for the purpose of attacking an opponent, as distinguished from its use as a means of defense.[384] In these circumstances, implied waiver may be found where two elements are satisfied:

> "The first is subjective—Does the person holding the right to claim the privilege intend to waive it? The second element is objective—Is it fair and consistent with the assertion of the claim or defense being made to allow the privilege to be invoked? This objective determination should be based upon whether the position taken by the party goes so far into the matter covered by the privilege that fairness requires the privilege shall cease even when, subjectively, he never intended that result. . . . '[T]he privilege of secret communication is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.'"[385]

Implied waiver based on these grounds was found where communications between the defendant's house and field counsel, concerning representations used in criminal contempt proceedings by plaintiff's counsel, were related and dependent upon the representations actually used in the proceedings.[386]

Mississippi has recognized another exception to the privilege based

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260, 265 (8th Cir. 1967) (privilege cannot be asserted on appeal if it was waived at trial); *In re* Whiting, 110 Me. 232, 85 A. 791, 792 (1913) (same).

[381] *See* Hunt v. Blackburn, 128 U.S. 464, 470-71 (1888) (client's testimonial waiver constituted waiver of right to object to attorney's testimony).

[382] *See* Control Data Corp. v. International Bus. Mach. Corp., 16 Fed. R. Serv. 2d 1233, 1236-37 (D. Minn. 1972) (no waiver where privileged documents inadvertently came into possession of adversary party).

[383] Wilburn v. Williams, 193 Miss. 831, 838, 11 So. 2d 306, 307 (1943).

[384] Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 343 (5th Cir. 1972); *see* Jones v. State, 65 Miss. 179, 183-84, 3 So. 379, 380 (1888) (attempt to convict codefendants with privileged matter is waiver); *cf.* International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973) (court has duty to carefully determine whether corporate communication is privileged since there is a potential for abuse).

[385] Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 342-43 (5th Cir. 1972) (quoting United States v. Woodall, 438 F.2d 1317, 1342 (5th Cir. 1970), quoting 8 J. WIGMORE, *supra* note 55, § 2327, at 638).

[386] Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 343 (5th Cir. 1972).

not upon waiver, but on necessity. In *McCaslin v. Willis*,[387] debtors sued to remove a cloud on their title, contending they had paid the debt secured by their land. The defendants, heirs of the secured creditor, offered testimony of the creditor's attorney, who was also the trustee named in the deed of trust. The attorney testified that his client had indicated before his death that the debt was still owed. The plaintiffs objected on grounds of privilege which could not be waived by the heirs.[388] The supreme court ruled the testimony admissible.[389] Although the court could have ruled that the attorney represented all parties to the deed of trust making the privilege inapplicable,[390] it based its holding on the principle that inadmissible hearsay may become admissible by way of necessity when made by a person since deceased. This rationale allows rebuttal testimony that the deceased had made a declaration against his interest which, because of his death, he is unable to deny.[391]

The *McCaslin* approach was followed in *Dexter v. United States*,[392] where suit was brought by the daughter of a deceased parent to recover income tax and penalties, the issue being whether transfers of property from her father were gifts or compensation. The plaintiff deposed her father's lawyer who had prepared the instruments of transfer, but when the defendant called the lawyer to testify at trial the daughter objected on grounds of privilege.[393] The court held the testimony admissible, not on grounds that taking the lawyer's deposition waived the privilege, as asserted by the defendant,[394] but because "[i]n search for the truth in this case it is essential for the Court to consider this testimony."[395]

McCaslin and *Dexter* indicate that an attorney for a deceased client, who knows information which is material and necessary for the proper administration of justice and has no reason to color his testimony, will be allowed to testify.[396] Even if the trial judge improperly allows the lawyer to testify, the party against whom the evidence is offered may not assert the error on appeal since he is not the client and therefore has no standing to complain.[397]

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[387] 197 Miss. 366, 19 So. 2d 751 (1944).
[388] *Id.* at 375-76, 19 So. 2d at 754.
[389] *Id.*
[390] See notes 298 through 303 and accompanying text *supra*.
[391] 197 Miss. at 376, 19 So. 2d at 754.
[392] 306 F. Supp. 415 (N.D. Miss. 1969).
[393] *Id.* at 421.
[394] *Id.* at 423.
[395] *Id.*
[396] See notes 387 through 395 and accompanying text *supra*.
[397] See note 366 and accompanying text *supra*.

G. Consultation in Furtherance of Crime or Fraud

"[C]ommunications made by the client to his attorney during or before the commission of a crime or fraud for the purpose of being guided or assisted in its commission are not privileged."[398] Indeed, the lawyer has a duty under the Code of Professional Responsibility's disciplinary rule 7-102(B)(1) to disclose fraud perpetrated by his client during the course of representation if the client refuses to rectify the situation.[399] Mississippi, however, does not follow this standard. In *Parkhurst v. McGraw*,[400] the court stated: "[T]he more plainly [the lawyer called to testify] makes the fraud appear, the greater, we must suppose, was the confidence reposed by the client, and his reliance upon the law to protect him against an abuse of the confidence, or the bad faith of the attorney."[401] Thus, the Fifth Circuit recently recognized that Mississippi would apply the privilege to communications made in furtherance of the commission of a tort unless disclosure is permitted by a waiver:[402] "[T]he privilege may not be breached by the attorney even to testify as to intent and motive having to do with the [fraud]."[403] Affirmative use of the communications as an attack mechanism will, however, effect a waiver of the privilege.[404]

H. Federal Question Cases

Federal standard 503 was withdrawn from the federal rules because of the compelling interest of the states in having their own substantive rules regarding the attorney-client privilege apply in diversity actions,[405] even though the standard has been called a codification of the common law rule of the attorney-client privilege.[406] The rule extends to five situa-

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[398] Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 342 (5th Cir. 1972); *accord*, United States v. Friedman, 455 F.2d 1076, 1085 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); Garner v. Wolfinbarger, 430 F.2d 1093, 1102 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); EVIDENCE HANDBOOK, *supra* note 1, at 179-80.

[399] However, the lawyer must receive information "clearly establishing" the fraud. ABA CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule 7-102(B)(1).

[400] 24 Miss. 134 (1852).

[401] *Id.* at 138.

[402] Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 342 (5th Cir. 1972); *accord*, Lengsfield & Co. v. Richardson, 52 Miss. 443, 447 (1876).

[403] Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 341 (5th Cir. 1972) (citing Lengsfield & Co. v. Richardson, 52 Miss. 443 (1876) and Parkhurst v. McGraw, 24 Miss. 134 (1852)).

[404] Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 343 (5th Cir. 1972).

[405] H.R. REP. No. 650, 93d Cong., 1st Sess. 8-9 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS, 7075, 7082.

[406] 2 WEINSTEIN'S EVIDENCE ¶ 503[02], at 503-17 (1976).

tions,[407] and a lawyer's authority to claim the privilege on behalf of his client who is not a party to the suit or who is deceased is presumed.[408]

Standard 503 is similar to Mississippi's attorney-client privilege in several respects. A "client," for example, is defined as one who seeks or receives services; consequently, no fee is necessary for the relationship to exist.[409] A "lawyer" is anyone licensed to practice or who is reasonably believed by the client to be a licensed lawyer.[410] Like Mississippi's rule, there can be no intention of disclosure to third persons not aiding in the legal representation for the communication to be privileged.[411] Whether or not the client intends confidentiality is to be inferred from the circumstances under which the communications are made.[412] Standard 503 departs from the common law, however, in that eavesdroppers do not destroy the federal privilege.[413] The federal privilege does not apply: (1) where the communication is made in furtherance of a fraud or crime,[414] to which Mississippi takes a contrary position;[415] (2) in actions between parties claiming through the same deceased,[416] an approach which Mississippi has taken on an ad hoc basis of necessity;[417] (3) in legal malpractice actions;[418] (4) to communications made concerning any document attested by a lawyer,[419] with which Mississippi is in accord;[420] and (5) where a lawyer represents joint clients,[421] which rationale Mississippi

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[407] FED. STANDARDS OF EVID. 503(b) provides that the privilege applies to a client's communications

> (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

[408] *Id.* 503(4)(c).

[409] *Id.* 503(a)(1); *accord*, Russell v. State, 185 Miss. 464, 474, 189 So. 90, 93 (1939) (attorney's competence to testify not dependent on receipt of fee).

[410] FED. STANDARDS OF EVID. 503(a)(2).

[411] *Id.* 503(a)(4); *accord*, Nebhan v. Mansour, 162 Miss. 418, 428, 139 So. 166, 167 (1932) (communication in presence of third party presumptively not confidential).

[412] FED. STANDARDS OF EVID. 503(a)(4), Advisory Comm. Note, *reprinted in* 2 WEINSTEIN'S EVIDENCE 503-5 (1976); *accord*, 2 WEINSTEIN'S EVIDENCE ¶¶ 503(a)(1)[01]-(4)[01], at 503-20 to -29 (1976).

[413] FED. STANDARDS OF EVID. 503(b); 2 WEINSTEIN'S EVIDENCE ¶ 503(b)[02], at 503-34 to -35 (1976).

[414] FED. STANDARDS OF EVID. 503(d)(1).

[415] See notes 398 through 403 and accompanying text *supra*.

[416] FED. STANDARDS EVID. 503(d)(2).

[417] *See generally* Dexter v. United States, 306 F. Supp. 415, 423-24 (N.D. Miss. 1969); McCaslin v. Willis, 197 Miss. 366, 376, 19 So. 2d 751, 753 (1944).

[418] FED. STANDARDS OF EVID. 503(d)(3).

[419] Id. 503(d)(4).

[420] Wilburn v. Williams, 193 Miss. 831, 838, 11 So. 2d 306, 307 (1943).

[421] FED. STANDARDS OF EVID. 503(d)(5).

has recognized in one case[422] but disregarded in another.[423]

An additional ground for waiver of the privilege is provided in federal rule 612.[424] If a witness is handed a privileged document to refresh his memory while he is on the stand, an unintentional but effective waiver of the privilege results as to that document.[425] The same risk applies with respect to such a writing shown to a witness to refresh his recollection before he testifies.[426]

I. Discovery and Work Product

Discovery rules applicable to the medical privilege also apply to the lawyer-client privilege.[427] Although the attorney-client privilege is a complete bar to discovery,[428] the privilege protects only communications and does not extend to facts. A client "may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."[429]

The expansive use of discovery suggests a trend toward a restriction on the use of the attorney-client privilege.[430] For example, where a party claims the privilege during discovery of matters about which he intends to testify at trial, anticipatory waiver occurs and discovery will be allowed as to that matter.[431] Once asserted during discovery, the attorney-client privilege cannot be waived at a later time to serve the client's purpose.[432] Even though certain material is discoverable, it may remain

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[422] Turnispeed v. Drummond, 217 Miss. 129, 137, 63 So. 2d 536, 539 (1953).

[423] Frierson v. Mississippi Road Supply Co., 221 Miss. 804, 809, 75 So. 2d 70, 72 (1954).

[424] FED. R. EVID. 612.

[425] *Id.* 612(1).

[426] *Id.* 612(2).

[427] See notes 230 through 242 and accompanying text *supra*. *See also* Michael, *Discovery and the Corporate Attorney-Client Privilege*, 58 CHI. BAR REC. 12 (1977).

[428] *See* FED. R. CIV. P. 26(b)(1) (any matter not privileged is subject to discovery); MISS. CODE ANN. § 13-1-226(b)(1) (Supp. 1977) (same).

[429] City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D.Pa. 1962).

[430] *See* International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 180 (M.D. Fla. 1973) (anticipatory waiver at discovery); FED. STANDARDS OF EVID. 503(d)(1)-(5) (exceptions to privilege); 2 WEINSTEIN'S EVIDENCE ¶ 503 [02], at 503-15 to -17 (same).

[431] International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 186 (M. D. Fla. 1973).

[432] O'Neal & Thompson, *supra* note 325, at 1778.

> Where a party ultimately intends to waive the privilege at trial, disclosure in advance thereof will cause no injury to the relation between attorney and client and can only benefit the correct disposal of litigation.
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> . . . .
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> [Therefore], it should be made clear that the failure of a party to allow pre-

inadmissible as irrelevant or immaterial.[433]

Separate and distinct from the attorney-client privilege is the work product doctrine. "[A] lawyer's work product consists of the information he has assembled and the mental impressions, the legal theories and strategies that he has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, mental impressions, personal beliefs, and other tangible or intangible means."[434] Briefly stated, work product encompasses material prepared in anticipation of litigation.[435] While not traditionally privileged, work product is protected by a qualified immunity which requires a showing of "substantial need" or "undue hardship" before disclosure will be compelled.[436] The attorney-client privilege is an evidentiary rule which operates both at trial and during discovery, while the work product doctrine operates only at the discovery stage. The distinction has been aptly drawn by the Supreme Court of New Hampshire:

> These two grounds for denial of pretrial discovery have different purposes and characteristics. The purpose of the attorney client privilege is to encourage full disclosure of information between an attorney and his client by guaranteeing the inviolability of their confidential communications . . . . Communications so privileged are not available on discovery nor are they admissible at the trial itself except on the client's consent . . . . The purpose for the protection accorded the work product of a lawyer is to preserve our adversary system of litigation by assuring an attorney that his private files shall, except in unusual circumstances (good cause or necessity), remain free from encroachments by his adversary . . . . Matters which constitute the work product of the lawyer may be subject to discovery for good cause shown, and if material and relevant may be admitted in evidence at the trial.[437]

It has been held that no testimonial privilege attaches to a lawyer's work product and that pretrial discovery of such materials can be obtained upon a showing of undue hardship or substantial need.[438] In contrast, the United States Supreme Court appears to have taken a differ-

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trial discovery of confidential matter which that party intends to introduce at trial will preclude introduction of that evidence.

International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 186 (M.D. Fla. 1973).

[433] Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 343 n.7 (5th Cir. 1972).

[434] State *ex rel.* Dudek v. Circuit Court, 34 Wis. 2d 559, 150 N.W.2d 387, 404 (1967).

[435] FED. R. CIV. P. 26(b)(3); MISS. CODE ANN. § 13-1-226(b)(3) (Supp. 1977).

[436] FED. R. CIV. P. 26(b)(3); MISS. CODE ANN. § 13-1-226(b)(3) (Supp. 1976).

[437] Riddle Spring Realty Co. v. State, 107 N.H.2d 271, 220 A.2d 751, 755 (1966) (citations omitted).

[438] *E.g.*, United States v. Nobles, 422 U.S. 225, 246-47 (1975) (White, J., concurring); City of Philadelphia v. Westinghouse Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).

ent view in *United States v. Nobles*[439] by alluding to a testimonial work product privilege:

> Moreover, the concerns reflected in the work product doctrine do not disappear once trial has begun. Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case. We need not, however, undertake here to delineate the scope of the doctrine at trial, for in this instance it is clear that the defense waived such right as may have existed to invoke its protections.[440]

The party resisting discovery has the burden of proving that the materials sought to be discovered were prepared in anticipation of litigation[441] and that substantial need of their disclosure exists in fact.[442] Just what "substantial need" encompasses is difficult to determine, but it has been found where: 1) the documents sought are material to the lawsuit; 2) the party seeking discovery will be at a distinct disadvantage at trial if he is denied access to the materials; and 3) there are no alternative sources to the information.[443] It is solely within the court's discretion to determine whether the party seeking discovery of work product has shown substantial need and is unable without undue hardship to get the equivalent of the materials by other means.[444]

Documents prepared by a party after the dispute arises but before a lawyer is hired are also work product—materials prepared "in anticipation of litigation."[445] A minority of courts hold, however, that such documents are work product only if there is a substantial probability at the time they are prepared that suit will result.[446] Not falling under work product protection are those materials gathered in the ordinary course of business and those gathered in compliance with statutes unrelated to litigation.[447] Likewise, any material prepared by or for a party's agent,

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[439] 422 U.S. 225 (1975).

[440] *Id.* at 239. More recently, the Court has referred to a "work product immunity" in deciding whether or not a statement met the statutory definition of work product under the Jenck's Act. United States v. Goldberg, 425 U.S. 94, 106 (1976) (citing Saunders v. United States, 316 F.2d 346, 350 (D.C. Cir. 1963)).

[441] SEC v. National Student Mkt. Corp., 18 Fed. R. Serv. 2d 1302, 1310-11 (D.D.C. 1974).

[442] FED. R. CIV. P. 26(b)(3); MISS. CODE ANN. § 13-1-226(b)(3) (Supp. 1977).

[443] Fidelity & Deposit Co. v. Stefan Strauss, Inc., 52 F.R.D. 536, 537 (E.D. Pa. 1971).

[444] Southern Ry. v. Lanham, 403 F.2d 119, 126 (5th Cir. 1968); Miles v. Bell Helicopter Co., 385 F. Supp. 1029, 1033 (N.D. Ga. 1974).

[445] *E.g.*, Arney v. George A. Hormel & Co., 53 F.R.D. 179, 181 (D. Minn. 1971).

[446] Miles v. Bell Helicopter Co., 385 F. Supp 1029, 1033 (N.D. Ga. 1974).

[447] Proposed Amendments to the Federal Rules of Civil Procedure, Advisory Comm. Notes, 48 F.R.D. 461, 481, 501 (1970); *see* McDougall v. Dunn, 468 F.2d 468, 473 (4th Cir. 1974) (holding statement given to insurance adjuster by defendant "discoverable").

unrequested by the attorney, is deemed to have been made in the ordinary course of business and cannot be classified as work product.[448]

Some courts hold that materials are protected by the work product doctrine only in the specific case for which they are prepared.[449] Others have held that materials prepared in anticipation of litigation are protected in subsequent cases if the suits are closely related.[450] One court has even held that any material prepared for litigation is protected in subsequent cases, regardless of whether the cases are related.[451]

The work product rule is relaxed in tax litigation for reasons of public policy,[452] but generally applies to criminal cases.[453] The protection under the work product doctrine may be waived, however, if reference to any protected document or statement is made at trial.[454]

J. Evaluation

The breadth of the Mississippi attorney-client privilege[455] properly fulfills its basic underlying purpose of encouraging uninhibited intercourse between lawyer and client.[456] The current approach to the privilege, it has been suggested, considers a balancing between the lawyer's obligation to his client to withhold confidences and the court's search for the truth in order that the ends of justice may be met.[457] A recent development has been the emergence of canon 4 of the Code of Professional Responsibility as a tool to prevent the attorney from revealing confidential communications.[458] The emerging overlap of professional services rendered by the lawyer with those of other professions has generated a slight restriction of the attorney-client confidential communi-

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[448] Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367, 372 (N.D. Ill. 1972). Thus, insurance investigative reports prepared by agents are usually held to have been made in the ordinary course of business and therefore are discoverable. *E.g.*, Atlanta Coca-Cola Bottling Co. v. Transam Ins. Co., 61 F.R.D. 115, 118 (N.D. Ga. 1972).

[449] United States v. International Bus. Mach. Corp., 19 Fed. R. Serv. 2d 349, 353-54 (S.D.N.Y. 1974).

[450] Midland Inv. Co. v. Van Alstyne, Noel & Co., 59 F.R.D. 134, 138-39 (S.D.N.Y. 1973).

[451] Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 484 (4th Cir. 1973).

[452] United States v. Brown, 349 F. Supp. 420, 430-31 (N.D. Ill. 1972).

[453] United States v. Nobles, 422 U.S. 225, 236 (1975).

[454] Kerns Constr. Co. v. Superior Court, 266 Cal. App. 2d 405, 72 Cal. Rptr. 74, 77 (Dist. Ct. App. 1968).

[455] *See generally* Lengsfield v. Richardson, 52 Miss. 443, 447 (1876); Crisler v. Garland, 19 Miss. (11 S. & M.) 136, 138-40 (1848).

[456] Crisler v. Garland, 19 Miss. (11 S. & M.) 136, 138-40 (1848).

[457] *See generally* Comment, *Attorney-Client Confidentiality: A New Approach*, 4 HOFSTRA L. REV. 685 (1976).

[458] *See generally* Comment, *supra* note 360, at 659.

cations privilege by the courts.[459] However, there is no danger that the privilege will lose its efficacy in American jurisprudence.[460] The great majority of the work a lawyer does on behalf of a client involves legal advice upon which the client, to some degree, bases his conduct. Litigation comprises only a small portion of the total legal assistance provided.[461] Therefore, evidence barred by the privilege is slight when compared to the protection of the relationship of client and counselor thus fostered.

V. The Marital Privilege

There are two distinct evidentiary principles arising from the husband and wife relationship. The first bars one spouse from testifying against the other without the consent of both.[462] The second prevents disclosure of all communications made during the marital relationship.[463] The first is a rule of competency, to be governed by the law dealing with the competency of witnesses. The second is a rule of confidential communications, to be governed by the law of interpersonal privileges. A reading of the Mississippi cases on marital privilege reveals a tendency by the court to obliterate the distinction between the two rules.[464] Nevertheless, they will be treated separately here.

A. The Rule of Competency

1. Generally

At common law, one spouse was incompetent to testify for or against the other[465] except in a criminal prosecution of one for acts of personal violence committed against the other.[466] Under the current ver-

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[459] Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1234 (1962).

[460] *Id.* at 1240.

[461] Sedler & Simeone, *supra* note 8, at 3.

[462] MISS. CODE ANN. § 13-1-5 (1972). See Witnesses ⊂⊃ 5, 51-66, 76(3), 106, 140(9), 143(5), 146, 187-195, 219(2), 292, 305.

[463] *See* United States v. Harper, 450 F.2d 1032, 1045-46 (5th Cir. 1971) (confidential communications inadmissible).

[464] *Compare* Carter v. State, 167 Miss. 331, 340, 145 So. 739, 741 (1932) (testimony "competent" if communication is "not of a confidential nature") *and* Whitehead v. Kirk, 104 Miss. 776, 812, 61 So. 737, 738 (1913) (same) *with* Hesdorffer v. Hiller, 111 Miss. 16, 20, 71 So. 166, 166 (1916) (although divorce removes incompetency, the privilege still applies to communications made while married).

[465] State v. McMullins, 156 Miss. 663, 665-66, 126 So. 662, 663 (1930).

[466] *Id.* For a development of the common law rule, see Comment, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUMB. L. REV. 307 (1976). For a comment on its historical development in Mississippi, see Saffold v. Horne, 72 Miss. 470, 481-84, 18 So. 433, 436-37 (1895).

sion of the marital privilege statute in Mississippi,[467] husbands and wives may be introduced as witnesses by each other in both civil and criminal actions[468] and may testify against one another in controversies between themselves. They are, however, incompetent to give testimony against each other in all other circumstances—whether at trial, or in depositions or interrogatories—without the consent of both. Thus, the present statute is a modification of the common law rule.[469]

The rationale of the marital privilege of incompetency is set forth in *Merritt v. State*:[470]

> The reasons for the common law rule and its codified form are two-fold: (1) at common law, the husband and wife were considered as but one person and because of this unity and identity of husband and wife, when one was excluded on the ground of interest, the other was also excluded (at that time a party in interest was not a competent witness in his own behalf); (2) the courts were reluctant to sanction any rule tending to promote domestic dissension and endeavored to preserve inviolate the mutual confidence which is essential to the marriage relation, the peace of society, and the social welfare. The common law rule is of great antiquity.[471]

Where the rule's purpose of supporting domestic tranquility is defeated because of a controversy between the spouses, the rule of incompetency is no longer applicable.[472] Thus, the only exception to the general rule of incompetency, which bars one spouse's testimony against the other without the consent of both or waiver, is found when a "controversy has arisen" between them during the marital relationship.[473] "Controversy" between the two has traditionally meant violence against the person of one spouse, such as an assault by husband against wife.[474] Crimes or suits involving property of one or the other do not

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[467] MISS. CODE ANN. § 13-1-15 (1972).

[468] The privilege also applies to grand jury proceedings. Graham v. State, 250 Miss. 816, 817-18, 168 So. 2d 497, 497 (1964) (dictum).

[469] State v. McMullins, 156 Miss. 663, 665, 126 So. 662, 663 (1930).

[470] 339 So. 2d 1366 (Miss. 1976).

[471] *Id.* at 1368 (citations omitted).

[472] *See* Tapp v. State, 347 So. 2d 974, 977 (Miss. 1977) (wife incompetent to testify against husband so long as marriage is harmonious); Merritt v. State, 339 So. 2d 1366, 1369 (Miss. 1976) (wife competent to testify against husband where husband directs personal violence towards her).

[473] Doss v. State, 156 Miss. 522, 530, 126 So. 197, 199 (1930).

[474] Tapp v. State, 347 So. 2d 974, 977 (Miss. 1977) (distinguishing violence against a spouse from that against a child); *see* Huff v. State, 176 Miss. 443, 446, 169 So. 839, 840 (1936) (wife incompetent in criminal case unless crime was against her); McQueen v. State, 139 Miss. 457, 468, 104 So. 168, 169-70 (1925) (spouse not competent in bigamy case since bigamy is a public wrong rather than a controversy between spouses). *But see*

invoke the exception unless the *person* of one spouse is infringed in some way by the other.[475] In *Merritt v. State*,[476] a 1976 case, an equally divided Mississippi Supreme Court left open the question as to the scope of "controversies" between spouses by extending the exception to controversies between parent and child.[477] The court appeared to broaden the exception to any case between or involving spouses or members of the family wherein the presumption of marital peace and domestic harmony is destroyed, thereby "ravaging" the very reason for the rule.[478] One year later, however, the court clarified *Merritt* in *Tapp v. State*,[479] holding that only actual destruction of marital harmony by a controversy within the family will render a spouse competent to testify.[480]

2. The Marital Relationship

Competency or incompetency depends on the marital status at the time of trial, and not at the time of the incident giving rise to the lawsuit.[481] A showing of a valid marriage at the time of trial is binding upon a court of law.[482] When the spouse of a party is sought to be introduced adversely and is shown to be married of record, validity of the marriage must be presumed, and the trial court has no authority to rule the marriage void or voidable for any reason.[483] Since only the chancery courts may determine the validity of marriages, it is reversible error

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Merritt v. State, 339 So. 2d 1366 (Miss. 1977) (violence against child presumed to have destroyed domestic harmony and the marital relationship).

[475] State v. McMullins, 156 Miss. 663, 666, 126 So. 662, 663 (1930).

[476] 339 So. 2d 1366 (Miss. 1976) (Broom, J., did not participate).

[477] *Id.* at 1369-70. *But cf.* Tapp v. State, 347 So. 2d 974, 977 (Miss. 1977) (wife cannot be compelled to testify against husband in child abuse case where marital relationship not destroyed).

[478] 339 So. 2d at 1369. The competency privilege has also been held to have been amended by Mississippi's civil commitment statute to allow a spouse to submit affidavits in commitment proceedings. Brown v. United States, 321 F.2d 898, 899 (5th Cir. 1963).

[479] 347 So. 2d 974 (Miss. 1977).

[480] *Id.* at 977.

[481] *See* Hudson v. McAdory, 268 So. 2d 916, 923 (Miss. 1972) (former wife competent to testify against former husband after divorce); Doss v. State, 156 Miss. 522, 530, 126 So. 197, 199 (1930) (wife incompetent to testify about crimes husband committed against her before marriage); Hesdorffer v. Hiller, 111 Miss. 16, 19, 71 So. 166, 167 (1916) (former husband competent to testify against former wife after divorce).

[482] Doss v. State, 156 Miss. 522, 531-32, 126 So. 197, 199 (1930).

> It follows, therefore, that, so long as the marriage has been duly performed under license issued therefor, the wife is not a competent witness against the husband except for a crime committed against her while such relation exists. If the marriage is dissolved or annulled, her competency would be restored as to the offenses committed prior to said marriage.

Id.

[483] *Id.* at 529, 126 So. at 198-99.

to allow one spouse to testify against the other over an objection timely raised.[484] Moreover, the competency privilege remains even though the spouses are legally separated.[485] Where a witness claims or is claimed to be a common-law spouse,[486] the witness must show that he or she has no other living spouse,[487] that the two intended to cohabit permanently and exlusively in good faith as husband and wife and that neither has obtained a divorce.[488]

Once the marital relationship is destroyed, the ex-spouse immediately becomes a competent witness against the other spouse and can testify as to any matter within his or her personal knowledge[489] with the exception of confidential communications made during the marriage.[490] Thus, a divorcee may be introduced as a witness against an ex-spouse, for competency has been restored,[491] and may testify to unprivileged matters during the marriage and events occurring before the marriage or after the divorce.[492] The court has also recently held that an ex-spouse is competent to testify against the other while the divorce is pending appeal to the state supreme court.[493]

3. Use and Application at Trial

As a general rule, the consent of one spouse to testify against the other is insufficient to confer competency; except in controversies between themselves, the consent of both is required.[494] A spouse may be called to testify against the other if the party seeking introduction can show, out of the presence of the jury, "clear and certain" evidence to defeat the presumption that the witness is married to the other party.[495] Where the presumption of marriage is attacked, the spouse who is a party may cross-examine his claimed spouse on the fact of marriage

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[484] *Id.* at 531-32, 126 So. at 199.

[485] Outlaw v. State, 208 Miss. 13, 19-20, 43 So. 2d 661, 663 (1949); State v. McMullins, 156 Miss. 663, 665-66, 126 So. 662, 663 (1930).

[486] For a common law marriage to exist in Mississippi, the parties must have contracted prior to April 5, 1956. MISS. CODE ANN. § 93-1-15 (1972).

[487] Gaines v. State, 272 So. 2d 919, 920 (Miss. 1973).

[488] Barton v. State, 165 Miss. 355, 359, 143 So. 861, 861 (1932).

[489] Hesdorffer v. Hiller, 111 Miss. 16, 19-20, 71 So. 166, 167 (1916).

[490] *Id.* at 20, 71 So. at 167.

[491] *Id.* at 19-20, 71 So. at 167.

[492] T. MCELROY, *supra* note 81, § 135, at 416.

[493] Hudson v. McAdory, 295 So. 2d 766, 769 (Miss. 1974).

[494] Tapp v. State, 347 So. 2d 974, 977 (Miss. 1977); Outlaw v. State, 208 Miss. 13, 18-19, 43 So. 2d 661, 664 (1949).

[495] Wallace v. State, 254 Miss. 944, 950, 183 So. 2d 525, 527 (1966). *See also* Barton v. State, 165 Miss. 355, 359, 143 So. 861, 861 (1932) (facts failed to establish common law marriage).

without waiving the competency privilege.[496]

A party who knows in advance of the existence of marriage should not call one spouse without first obtaining the consent of both spouses since merely offering the testimony, without more, may constitute reversible error.[497] Moreover, a lawyer should not allude to the fact that the spouse of the other party was a witness to the incident at issue in the presence of the jury, since "it is doubtful that the prejudicial effect could be effectively removed from the minds of the jurors."[498] It is likewise improper to ask a party whether he intends to call his spouse to testify.[499] When an incompetent spouse is called to testify, the opposing party should immediately make an evidentiary objection along with a motion for a mistrial or risk the possibility of waiving the objection on appeal.[500]

Where it is not known beforehand whether a witness is the spouse of a party, and the competency objection is raised, the trial judge should immediately excuse the jury and conduct a preliminary investigation to determine whether a valid marriage exists.[501] Where the spouse is erroneously allowed to testify in a civil case, and the party calling the spouse is otherwise entitled to a directed verdict or peremptory instruction, then only harmless error has been committed.[502] It is reversible error, however, to make any reference during a closing argument to a party's

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[496] Wallace v. State, 254 Miss. 944, 950, 183 So. 2d 525, 527 (1966).

[497] *See* Warren v. State, 336 So. 2d 726, 730 (Miss. 1976) (reversible error for prosecutor to inform jury of court's refusal to allow testimony); Outlaw v. State, 208 Miss. 13, 20, 43 So. 2d 661, 664 (1949) (reversible error to allow prosecutor to call spouse even though defense attorney's objection was sustained).

[498] Warren v. State, 336 So. 2d 726, 730 (Miss. 1976). "Appellant's right to withhold her consent would mean little or nothing if the exercise of the right is made by the means of prejudicing the jury against her." *Id.*

[499] Fairley v. State, 255 Miss. 371, 83 So. 2d 278, 279 (1955); Outlaw v. State, 208 Miss. 13, 19, 43 So. 2d 661, 663-64 (1949).

[500] Blackwell v. State, 44 So. 2d 409, 410 (Miss. 1950).

In Huff v. State, 176 Miss. 443, 169 So. 839 (1936), the court stated:

> Whenever witnesses are offered in court who are incompetent, objection as to their competency should be made before the reception of the evidence, and certainly before the conclusion of the evidence . . ., so that the trial judge might decide the question at once. If a party does not object to the competency of a witness when presented, such objection is waived if the party knew of the facts constituting this incompetency at the time the evidence was offered. If he does not object he, in effect, consents, and he will not be permitted to experiment with the evidence and see whether it is helpful to him, and then later to move to have such evidence excluded, provided the facts constituting incompetency were then known.

Id. at 446-47, 169 So. at 840.

[501] Wilson v. State, 204 Miss. 111, 116-17, 37 So. 2d 19, 20 (1948).

[502] Spencer v. O'Bryant, 140 Miss. 474, 478, 106 So. 6, 7 (1925).

failure to call a spouse. Neither may an unfavorable inference be drawn by the jury for failure to call a spouse, since the spouse cannot be compelled to testify in the first place.[503]

If both parties to the marriage are codefendants in a suit, and forcing one to testify against his interest would also be against the interest of the other spouse, the testimony should not be allowed.[504] Additionally, when one codefendant spouse desires to testify in his own behalf, but to do so would injure his spouse, he should move for a severance to avoid a prejudicial effect.[505] The dangers in failing to do so are illustrated by *Finch v. Branham*,[506] a breach of contract suit against both spouses seeking to set aside a fraudulent conveyance from husband to wife. The court held that it was not improper for the chancellor to allow the wife to testify,[507] holding that her testimony went only to the conveyance. Since the husband no longer owned the property, he had no interest to be adversely affected, and the wife was deemed to have testified against her interests only.[508] Although this rule is of sound reasoning, it may have been misapplied in *Finch*. The husband conveyed his realty to his wife, but the opinion fails to discuss the possibility that he retained his homestead interest in at least part of the fraudulently conveyed property. It has been held on other occasions that a homestead interest is sufficient to keep one codefendant spouse from testifying against the other,[509] and the rule has been applied to other suits to set aside fraudulent conveyances.[510] Thus, whenever it appears that spouses sued together have a unity of interest in the outcome of the suit, the competency restriction should apply.[511]

Another curious misapplication of the competency concept has occurred where the court held that a third person is "incompetent" to testify to what a party's spouse told him, by way of admissions or otherwise, on grounds that it violates the husband-wife privilege.[512] This rule

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[503] Daniels v. Beeson, 312 So. 2d 441, 443-44 (Miss. 1975); Turnage v. State, 216 Miss. 813, 815-16, 63 So. 2d 220, 221 (1953); Johnson v. State, 63 Miss. 313, 316-17 (1885).

[504] Whitney Nat'l Bank v. Stirling, 177 Miss. 325, 337-38, 170 So. 692, 693 (1936).

[505] *See* United States v. Crockett, 534 F.2d 589, 604 (5th Cir. 1976) (severance granted).

[506] 148 Miss. 137, 114 So. 257 (1927).

[507] *Id.* at 147, 114 So. at 259.

[508] *Id.*

[509] Whitney Nat'l Bank v. Stirling, 177 Miss. 325, 337-38, 170 So. 692, 693 (1936).

[510] Virden v. Dwyer, 78 Miss. 763, 30 So. 45 (1901) (husband incompetent); Leach v. Shelby, 58 Miss. 681 (1881) (wife incompetent).

[511] *See generally* Saffold v. Horne, 72 Miss. 470, 481, 18 So. 433, 436 (1895).

[512] *See* Ford v. State, 218 So. 2d 731, 733 (Miss. 1969) (sheriff); Thompson v. State, 206 So. 2d 195, 197-98 (Miss. 1968) (same); Caldwell v. State, 194 So. 2d 878, 881 (Miss. 1967) (police officers); Smith v. State, 193 Miss. 474, 478, 10 So. 2d 352, 353 (1942) (wife's friend).

has been criticized, and justly so, for such a witness is not incompetent on these grounds alone.[513] Instead of considering the competency of the witness, critics say, the evidence should be considered in light of its character as hearsay.[514] The rationale of the rule is that the opponent who cannot call the declarant should not be permitted to prove indirectly what cannot be proved directly.[515] The rule has been limited to verbal communications made by the spouse which are not part of the res gestae[516] and does not apply to actions observed by the third person called to testify.[517] Such a rationale defies reason because of the general rule that evidence itself is never incompetent, only a witness. The court simply confused the distinction between competency and privilege. If the person hearing a declaration made by the spouse is generally competent to testify, then the declaration made by the spouse should be considered for the hearsay that it is.[518] It cannot be considered privileged, for communications between spouses made in the presence of third persons are not privileged.[519] The rationale that a third person cannot testify as to the declaration simply because the spouse could not have done so is a fallacy. The reason the spouse cannot testify is based on the protection of marital harmony, in that forcing a spouse to testify against his or her mate would be disruptive to the marriage.[520] This purpose is not defeated by allowing a person not a party to the marriage to give the same testimony. It is not, after all, the declaration itself which is barred but merely the person from whom it is sought.

It has recently been suggested that the person making a marital competence objection must show that denying the testimony of one spouse against another would protect the harmonious relationship.[521] For example, in *Lutwak v. United States*,[522] aliens married for the sole purpose of gaining entry into this country. Because the marriage was found to be a sham and entered into for purposes of perpetrating a fraud, the privilege was held inapplicable.[523] Until the recent decision of *Merritt v. State*,[524] however, the only changes in marital competence in

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[513] Fox, *Evidence, The Work of the Mississippi Supreme Court, 1942-1946*, 18 MISS. L.J. 24, 25 (1946).

[514] *Id.*

[515] Fairley v. State, 255 Miss. 371, 83 So. 2d 278, 279 (1955).

[516] Eubanks v. State, 242 Miss. 372, 375, 135 So. 2d 183, 184-85 (1961).

[517] Boyd v. State, 204 So. 2d 165, 172 (Miss. 1967).

[518] Fox, *supra* note 513, at 25.

[519] Whitehead v. Kirk, 104 Miss. 776, 812, 61 So. 737, 738 (1913).

[520] Merritt v. State, 339 So. 2d 1366, 1368 (Miss. 1976).

[521] *See, e.g.*, United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975) (marriage of prosecution witness to defendant three days before trial).

[522] 344 U.S. 604 (1953).

[523] *Id.* at 615; *accord*, United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975).

[524] 339 So. 2d 1366 (Miss. 1976).

Mississippi had been wrought by the legislature.[525] In *Merritt* the court finally recognized that the common law rationale of competency has been eroded by twentieth century social changes[526] and expanded the rule as it applies to "controversies" between spouses.

B. The Rule of Privilege

The marital communications privilege in Mississippi is a matter of common law and is independent of the competency statute.[527] A general statement of the rule in Mississippi was provided by Justice Griffith:

> Communications between husband and wife made under the sanctity of the marital relation are protected from disclosure in any court of law or equity without the consent of both of them—this upon profound rules of public policy, in order that they may communicate with each other freely without apprehension that such confidence can at any time and in any event be violated. It equally applies when one only of them is a party and when neither of them is a party . . . .[528]

The privilege in Mississippi is analogous in "spirit and extent" to the attorney-client privilege.[529] Although earlier cases interpreted the privilege as a mere rule of evidence, and hence, a procedural rule,[530] it is more appropriate that the rule should be considered substantive in light of recent decisions holding the medical and attorney-client privileges to be substantive.[531]

For the privilege to attach to a communication, the marriage must have been valid at the time the communication was made, regardless of what the spouses believed.[532] Unlike marital competence which is destroyed when the marriage ceases, the marital communications privilege survives a spouse's death or divorce.[533] All communications between

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[525] *Id.* at 1372 (Lee, J., dissenting).

[526] *Id.* at 1368-70.

[527] *See* Hesdorffer v. Hiller, 111 Miss. 16, 20-21, 71 So. 166, 167 (1916) (competency statute does not affect the common law rule of privilege where spouses testify after divorce); Dunlap v. Hearn, 37 Miss. 471, 475 (1859) (competency statute does not remove common law privilege). *See also* United States v. Harper, 450 F.2d 1032, 1035 (5th Cir. 1975) (Mississippi statute creates physician-patient privilege that did not exist at common law).

[528] Martin v. State, 203 Miss. 187, 194, 33 So. 2d 825, 827 (1948) (Griffith, J., specially concurring).

[529] Dunlap v. Hearn, 37 Miss. 471, 474 (1859).

[530] Metropolitan Life Ins. Co. v. McSwain, 149 Miss. 455, 459, 115 So. 555, 557 (1928).

[531] *E.g.*, Hyde Constr. Co. v. Koehring Co., 455 F.2d 337, 340 (5th Cir. 1972) (attorney-client).

[532] *See* Barton v. State, 165 Miss. 355, 359, 143 So. 861, 861 (1932) (no marital privilege where facts showed there was no valid common law marriage).

[533] Carter v. State, 167 Miss. 331, 340, 145 So. 739, 741 (1933); Dunlap v. Hearn, 37

spouses are presumptively confidential[534] so that the burden is on the party seeking introduction of the evidence to prove that the communication is not of a confidential nature. If that party can overcome the presumption, the privilege is destroyed.[535]

A "communication" protected by the privilege generally encompasses any communicative expression, whether by act or word, made in marital confidence.[536] The privilege extends to letters between spouses,[537] observed acts,[538] revealed facts, and any knowledge obtained solely by reason of the marriage.[539] The Mississippi Supreme Court has held that the privilege applies when a "communication" can be reasonably construed to be confidential.[540] The privilege is lost to communications made in the presence of third persons,[541] even though the third person is a family member.[542] If, however, the spouses are not conscious of the third person's presence, the party seeking introduction must prove that a third party was present when the communication was made.[543]

The trial court has a duty to uphold the communications privilege regardless of whether a spouse is a party.[544] When neither spouse is a party, the court should of its own motion, exclude matter privileged by the marital relationship.[545] If a spouse is wrongfully forced to testify to privileged matters, his remedy may be to testify and appeal for certain reversal, although only a spouse who is a party to the suit has standing to appeal such an error.[546] When one spouse is ordered to testify to

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Miss. 471, 474 (1859). The privilege prevents a wife who is contesting her husband's will from testifying over objection to her deceased husband's acts and conversations. Whitehead v. Kirk, 104 Miss. 776, 812, 61 So. 737, 738 (1913).

[534] Blau v. United States, 340 U.S. 332, 333 (1951); Whitehead v. Kirk, 104 Miss. 776, 813, 61 So. 737, 738 (1913); *cf.* Carter v. State, 167 Miss. 331, 341, 145 So. 739, 741 (1933) (where communication is confidential, husband and wife are presumed to have been alone or unaware of another's presence at the time the communication was made).

[535] *See* Carter v. State, 167 Miss. 331, 341, 145 So. 739, 741 (1933) (privilege retained where party seeking to introduce testimony failed to prove there was a third party to spouses' communication).

[536] C. McCORMICK, *supra* note 3, § 79, at 163-64.

[537] Martin v. State, 203 Miss. 187, 192, 33 So. 2d 825, 826 (1948).

[538] *See* Whitehead v. Kirk, 104 Miss. 776, 812-13, 61 So. 737, 738 (1913) (wife not allowed to testify about her husband's drinking, delusions, or violence where no third party observed the conduct).

[539] EVIDENCE HANDBOOK, *supra* note 1, at 181.

[540] Whitehead v. Kirk, 104 Miss. 776, 814, 61 So. 737, 738 (1913).

[541] *Id.* at 813, 61 So. at 738; C. McCORMICK, *supra* note 3, § 82, at 167.

[542] Wolfe v. United States, 291 U.S. 7, 17 (1934).

[543] *See* Carter v. State, 167 Miss. 331, 341, 145 So. 739, 741 (1933) (presumption that communication was private).

[544] Martin v. State, 203 Miss. 187, 191-92, 33 So. 2d 825, 826 (1948).

[545] *Id.* at 194, 33 So. 2d at 827 (Griffith, J., specially concurring).

[546] *Id.* at 192, 33 So. 2d at 826; *see* United States v. Crockett, 534 F.2d 589, 604 (5th Cir. 1976) (only a holder of the marital privilege has standing to appeal admission of a

privileged communications, and the other spouse is not a party who may appeal the allowance of such testimony, the only available remedy is to refuse to testify and appeal from any "compulsory process for contempt."[547]

To classify a spouse as "incompetent" to testify to marital communications is incorrect since the testimony is privileged, and objection to it may be waived.[548] Since the privilege is held by both, it can be waived only by consent of both.[549] Implied waiver can result, however, where a party fails to make a timely objection to admission.[550] Still, a spouse does not waive the privilege by merely testifying for the other unless he testifies about protected matters.[551] As with the attorney-client privilege, no inference may be drawn from the assertion of the communications privilege.[552]

Critics of the marital communications privilege maintain that because of the changing nature and mores of marriage in American society, the privilege no longer serves the purpose for which it was developed.[553] Moreover, an even stronger argument exists for dispensing with the presumption of confidentiality, in that the danger of suppression of evidence can outweigh the possible benefit of encouraging marital confidence.[554] Accordingly, the Fifth Circuit recently treated the marital communications privilege as it would have any other privilege, requiring

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confidential communication).

[547] Martin v. State, 203 Miss. 187, 192-93, 33 So. 2d 825, 826 (1948).

[548] C. McCormick, *supra* note 3, § 83, at 169. *See also* Carter v. State, 167 Miss. 331, 340, 145 So. 739, 741 (1933) (spouse competent to testify generally but not about privileged matter).

[549] Martin v. State, 203 Miss. 187, 194, 33 So. 2d 825, 827 (1948) (Griffith, J., specially concurring). *See also* Warren v. State, 336 So. 2d 726, 730 (Miss. 1976) (husband and wife are not competent to testify "except in 'controversies between them without the consent of both' ").

[550] United Timber & Lumber Co. v. Alleged Dependents of Hill, 226 Miss. 540, 546, 84 So. 2d 921, 923 (1956); Huff v. State, 176 Miss. 443, 447, 169 So. 839, 840 (1936). *But see* Carter v. State, 167 Miss. 331, 145 So. 739, (1933), where the court stated:

> There is respectful authority in this country for the position that the appellate court in the matter of privileged communications between husband and wife, on the ground of public policy, will enforce the rule *even when there is no objection in the lower court*, and the matter was first raised in the appellate court. But we are not required to go that far in this case.

Id. at 342, 145 So. at 742 (emphasis added).

[551] Allen v. State, 35 Okla. Crim. 64, 248 P. 655, 656 (Crim. App. 1940). *See generally* Evidence Handbook, *supra* note 1, at 182.

[552] Killings v. Metropolitan Life Ins. Co., 187 Miss. 265, 278-79, 192 So. 577, 579-80 (1940). *Contra*, 1 ALI Basic Prolbems of Evidence 98 (1954).

[553] *E.g.*, Comment, *supra* note 466, at 318-19.

[554] *Id.*

the communication to meet all elements of confidentiality before it could be excluded on that basis.[555]

C. *Federal Question Cases*

Standard 505[556] dispenses with the marital competency and communications privilege in federal civil cases, and the competence-privilege retained in criminal proceedings is more restricted than the general rules followed by the Mississippi courts.[557] All that remains of the common law rule under the standard is that a criminally accused may prevent his spouse from testifying against him in all criminal cases but those involving (1) a crime by the accused against the person or property of the other spouse, (2) matters arising prior to the marriage, and (3) imposed prostitution.[558] The privilege extends to all testimony of a spouse in criminal proceedings, and if the spouse is allowed to testify at all, it is waived as to all matters, including confidential communications.[559] Of course, the communications must nevertheless satisfy hearsay requirements to be admissible.[560] Just as in Mississippi, standard 505(b) calls for the consent of both spouses before the testimony becomes admissible, and a spouse called to testify may assert the privilege on behalf of the accused.[561] Standard 505 differs primarily from the Mississippi rule in that it does not recognize a privilege for confidential

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[555] United States v. Harper, 450 F.2d 1032, 1045, 1046 n.9 (5th Cir. 1971).

[556] FED. STANDARDS OF EVID. 505 provides:

(a) General rule of privilege.—An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

(b) Who may claim the privilege.—The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of the evidence to the contrary.

(c) Exceptions.—There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328, with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424, or with violation of other similar statutes.

[557] *See* 2 WEINSTEIN'S EVIDENCE ¶ 505[02], at 505-9 (1976) (standard 505 restricts the privilege in criminal proceedings to the accused's right to prevent his spouse from testifying against him).

[558] FED. STANDARDS OF EVID. 505(c)(1)-(3). *See generally* Orfield, *The Husband-Wife Privileges in Federal Criminal Procedure*, 24 OHIO ST. L.J. 144, 144-49 (1963).

[559] 2 WEINSTEIN'S EVIDENCE ¶ 505[03], at 505-12 (1976).

[560] *Id.* at 505-14.

[561] FED. STANDARDS OF EVID. 505(b); 2 WEINSTEIN'S EVIDENCE ¶ 505[04], at 505-16 (1976).

communications.[562] The drafters, feeling that the traditional reasons for the privilege are no longer relevant, simply eliminated the communications privilege.[563]

VI. The Priest-Penitent Privilege

A. Generally

Mississippi's newest interpersonal testimonial privilege is the priest-penitent privilege.[564] As a general rule the privilege embraces communications made to any spiritual advisor of official designation in any religion.[565] The clergy's privilege is not of common law origin[566] but is a creature of legislative enactment.[567] The privilege has never been directly addressed in Mississippi even though the issue was presented to the court before the passage of the statute. In *Barnes v. State*[568] the

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[562] *Compare* Martin v. State, 203 Miss. 187, 194, 33 So. 2d 825, 827 (1948) (Griffith, J., specially concurring) *with* Fed. Standards of Evid. 505(a), Advisory Comm. Note, *reprinted in* 2 Weinstein's Evidence 505-3 (1976).

[563] Fed. Standards of Evid. 505(a), Advisory Comm. Note, *reprinted in* 2 Weinstein's Evidence 505-3 (1976).

[564] Miss. Code Ann. § 13-1-22 (Supp. 1977) provides:

(1) As used in this section:

(a) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a church, religious organization, or religious domination.

(b) A communication is "confidential" if made privately and not intended for further disclosure except in furtherance of the purpose of the communication.

(2) A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(3) The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman shall claim the privilege on behalf of the person unless the privilege is waived.

(4) A clergyman's secretary, stenographer or clerk shall not be examined without the consent of the clergyman concerning any fact, the knowledge of which was acquired in such capacity.

See Witnesses ⚖ 5, 215, 219(1), 292, 305.

[565] *In re* Swenson, 183 Minn. 602, 237 N.W. 589, 590-91 (1931).

[566] *Id.*; J. Wigmore, *supra* note 55, § 2394, at 869; 18 Miss. L.J. 180, 180 (1947). Common law judges did, however, have discretion to grant such a privilege when they deemed it necessary. Reese, *Confidential Communications to the Clergy*, 24 Ohio St. L.J. 55, 56-57 (1963). *See generally* 8 J. Wigmore, *supra* note 55, § 2394, at 869.

[567] *E.g.*, Ariz. Rev. Stat. Ann. § 12-2233 (1956); Ark. Stat. Ann. § 28-606 (1962); Cal. Evid. Code § 1032 (Deering 1966); Colo. Rev. Stat. § 35-14-108 (1973); Del. Code Ann. tit. 10, § 431 (1975); Haw. Rev. Stat. § 621-20 (1968); Idaho Code § 9-203 (1948); Ill. Rev. Stat. ch. 51, § 48.1 (1966); Mass. Ann. Laws ch. 233, § 20A (Michie/Law. Co-op. 1974); Pa. Stat. Ann. tit. 28, § 331 (Purdon Supp. 1977); Wis. Stat. Ann. § 905.06 (West 1973). For a comparison of such statutes in the different states, see Reese, *supra* note 566, at 61-66.

[568] 199 Miss. 86, 23 So. 2d 405 (1945), *noted in* 18 Miss. L.J. 180 (1947).

defendant was convicted of murder based in part on his confession of guilt to "a minister of the gospel."[569] Without explanation, the court ruled that the minister could divulge the confession.[570] The decision indicates that before passage of the current statute, there was no clergyman's privilege in Mississippi.[571] Undoubtedly the testimony allowed in *Barnes* would not be admitted today.

B. Who is a "Clergyman"

Section 13-1-22 of the code defines a "clergyman" as any "minister, priest, rabbi, or other similar functionary" of a religious organization.[572] A "clergyman" need not be an ordained minister to come within the privilege[573] so long as his functions as a minister are authorized by an established denomination.[574] To claim the privilege, then, the clergyman must show that he is authorized to perform functions—such as holding services or hearing confessions—similar to those performed by other clergymen of that particular denomination.[575] Thus, a person engaged in secular work can fall within the definition if these requirements are met.[576] For example, the privilege has been extended to elders and deacons of the Presbyterian Church, since they are chosen by the congregation to govern and direct the spiritual life of the church and to hold services in the minister's absence.[577]

Applying the privilege to well-established religions should pose little or no problem. A mere inspection of the dogma of a particular denomination will reveal the qualifications a spiritual leader must possess to function as the equivalent of a "minister." The issue becomes cloudy, however, when the privilege is invoked by a functionary of a cult. A court would be wise to seek guidance in this area from cases construing

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[569] 199 Miss. at 94, 23 So. 2d at 407.

[570] *Id.* at 96, 23 So. 2d at 408.

[571] 18 MISS. L.J. 180, 180 (1947).

[572] MISS. CODE ANN. § 13-1-22(a) (Supp. 1977).

[573] *In re* Verplank, 329 F. Supp. 433, 436 (C.D. Cal. 1971).

[574] *Id.* at 436-37.

[575] *In re* Murtha, 115 N.J. Super. 380, 279 A.2d 889, 891-92 (Super. Ct. App. Div. 1971).

[576] *See, e.g.*, United States v. Reeves, 325 F. Supp. 179, 185 (M.D. Fla. 1971) (construing Military Selective Service Act's ministerial exemption from military service).

[577] Reutkemeir v. Nolte, 179 Iowa 342, 161 N.W. 290, 292-93 (1917); *cf.* Cimijotti v. Paulsen, 219 F. Supp. 621, 624 (N.D. Iowa) (communication made by penitent to priest remained privileged where elders were present pursuant to church discipline), *appeal dismissed*, 323 F.2d 716 (8th Cir. 1963). Some would extend the definition of clergyman to one whom the declarant reasonably believes is a "clergyman," as does FED. STANDARDS OF EVID. 506(a).

the Selective Service Act which exempts "[r]egular or duly ordained ministers of religion" from the military draft.[578] The Act provides:

> (1) The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who *as his regular and customary vocation* preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.
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> . . . .
>
> (3) The term "regular or duly ordained minister of religion" *does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church*, religious sect or organization . . . .[579]

Under the Act, one who devotes one-half or less of his working time to religious activities does not meet the criteria for being a "minister" of that particular religion.[580] The mere title of "minister" does not evoke the exemption; it is brought into play by the pursuance of the vocation.[581] The Fifth Circuit has held, in a case arising from Mississippi, that the courts should look to the standards of the particular denomination or sect.[582] In addition, "[t]here must be regularity of religious activities, a vocation rather than an avocation, and a recognized standing as a minister to a congregation or leader of a group of lesser members of registrant's faith."[583] Still, a court's decision in a marginal situation involving a cult or sect that a witness is not a clergyman might unconstitutionally infringe on freedom of religion, especially if the privilege, like

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[578] 50 U.S.C. § 456(g) (Supp. V. 1975). Section 456(g)(1) provides: "Regular or duly ordained ministers of religion, as defined in this title [sections 451, 453, 454, 455, 456, and 458 to 471a of this Appendix], shall be exempt from training and service, but not from registration, under this title [said sections]."

[579] *Id.* § 466(g) (emphasis added).

[580] Dickenson v. United States, 346 U.S. 389, 395 (1953); *see, e.g.*, United States v. Harris, 446 F.2d 129, 132 (7th Cir.) (five hours per week held insufficient), *cert. denied*, 404 U.S. 994 (1971); United States v. Isenring, 419 F.2d 975, 979 (7th Cir.) (one-third of working time held insufficient), *cert. denied*, 397 U.S. 1024 (1970); *accord*, United States v. Babock, 339 F. Supp. 1281, 1281-82 (D. Minn. 1972) (military exemption denied where registrant was employed 40 to 60 hours a week as a cement finisher). *See generally* Annot., 1 A.L.R. Fed. 607 (1969).

[581] United States v. Kidson, 315 F. Supp. 132, 136 (D.N.H. 1970).

[582] Robertson v. United States, 417 F.2d 440, 447-48 (5th Cir. 1969) (Brown, C.J., specially concurring).

[583] *Id.* at 445.

others discussed in this article, is construed as a substantive matter of law.[584]

Section 13-1-22 is silent as to whether a clergyman must be from the communicant's congregation, denomination or religion. The majority rule is that the clergyman need not be.[585] Although Mississippi has not addressed the question, some state courts have held that the privilege does not apply where the communicant is not a member of any religious organization at all.[586]

The privilege has also been held inapplicable to communications made to a nun[587] or to members of a congregation[588] and elders or deacons not acting in the capacity as a clergyman when the communication is made.[589] Moreover, the term "clergyman" refers only to a natural person and not to a corporate entity.[590]

C. Confidentiality, Professional Capacity and Subject Matter

For the priest-penitent privilege to attach, the communication must meet two criteria: 1) it must be intended to be confidential,[591] and 2) it must have been made to the "clergyman in his professional character as spiritual advisor."[592] Thus,

> [t]he mere fact that the communication was made to a priest or minister does not of itself establish a privilege, but it must have been made in the confidence of the relation and under such circumstances as to

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[584] 2 WEINSTEIN'S EVIDENCE ¶ 506[02], at 506-7; Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religious Clause*, 29 U. PITT. L. REV. 27, 59-63 (1967).

[585] *E.g., In re* Swenson, 183 Minn. 602, 237 N.W. 589, 591 (1931); Kohloff v. Bronx Savings Bank, 37 Misc. 2d 27, 233 N.Y.S.2d 849, 850 (Cir. Ct. N.Y. 1962).

[586] Alford v. Johnson, 103 Ark. 236, 146 S.W. 516, 517-18 (1912); Johnson v. Commonwealth, 310 Ky. 557, 221 S.W. 2d 87, 89 (1949); State v. Morgan, 196 Mo. 177, 95 S.W. 402, 404 (1906).

[587] *In re* Murtha, 115 N.J. Super. 380, 279 A.2d 889, 891-93 (Super. Ct. App. Div. 1971).

[588] Commonwealth v. Drake, 15 Mass. 154, 155 (1818).

[589] Knight v. Lee, 80 Ind. 201, 204 (1881).

[590] United States v. Luther, 481 F.2d 429, 432 (9th Cir. 1973).

[591] MISS. CODE ANN. § 13-1-22(1)(b) (Supp. 1977); *accord, e.g.*, United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971); People v. Johnson, 270 Cal. App. 2d 204, 75 Cal. Rptr. 605, 606-07 (Ct. App. 1969); State v. Lender, 266 Minn. 561, 124 N.W.2d 355, 358 (1963); Kruglikov v. Kruglikov, 29 Misc. 2d 17, 217 N.Y.S.2d 845, 846-47 (Spec. Term., Sup. Ct.), *appeal dismissed*, 16 App. Div. 735, 226 N.Y.S.2d 931 (1961).

[592] MISS. CODE ANN. § 13-1-22(2) (Supp. 1977); *accord*, Mullen v. United States, 263 F.2d 275, 277 (D.C. Cir. 1958); Alford v. Johnson, 103 Ark. 236, 146 S.W. 516, 517-18 (1912); Dehler v. State, 22 Ind. App. 383, 53 N.E. 850, 853 (App. 1899); *In re* Estate of Koellen, 162 Kan. 395, 176 P.2d 544, 550-51 (1947).

imply that it should forever remain secret in the breast of the confidential advisor.[593]

The statute does allow the clergyman to transmit the communication to other persons at the direction of the communicant and still retain confidentiality, but only if it is transmitted "in furtherance of the *purpose* of the communication."[594]

The statements must be made to the clergyman in his professional capacity or under a rule or practice of the church.[595] The clergyman's purpose must be to render the communicant spiritual advice or guidance.[596] Statements made to him outside his professional capacity as a spiritual advisor are not privileged,[597] even though a statement may be "penitential" in nature.[598] The protected communications include verbal confessions,[599] telephone conversations,[600] and acts that transmit an idea in the "quest for religious or spiritual advice or comfort."[601] Some courts extend the privilege to any communications made "in circumstances that disclosure would violate a sacred or moral trust."[602]

In some states, statements made to a clergyman acting in a marriage counselor's role have been held not privileged where no spiritual advice was rendered.[603] Similarly, casual statements,[604] church records,[605]

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[593] EVIDENCE HANDBOOK, *supra* note 1, at 183 (footnotes omitted) (citing Hills v. State, 61 Neb. 589, 85 N.W.836, 837-38 (1901)).

[594] MISS. CODE ANN. § 13-1-22(1)(b) (Supp. 1977) (emphasis added); *accord, In re* Verplank, 329 F. Supp. 433, 435 (C.D. Cal. 1971); Milburn v. Haworth, 47 Colo. 593, 108 P. 155, 156 (1910); Angleton v. Angleton, 84 Idaho 184, 370 P.2d 788, 797 (1962).

[595] Alford v. Johnson, 103 Ark. 236, 146 S.W. 516, 517-18 (1912).

[596] State v. Brown, 95 Iowa 381, 64 N.W. 277, 278 (1895).

[597] Blossi v. Chicago & Nw. Ry., 144 Iowa 697, 123 N.W. 360, 367 (1909). Where, for example, a minister acts as an interpreter, Partridge v. Partridge, 220 Mo. 321, 119 S.W. 415, 416 (1909), or as a notary public, Christensen v. Pestorious, 189 Minn. 548, 250 N.W. 363, 365 (1933), he is not acting as a spiritual advisor, and the privilege does not apply.

[598] Alford v. Johhson, 103 Ark. 236, 146 S.W. 516, 517-18 (1912).

[599] Mullen v. United States, 263 F.2d 275, 277-79 (D.C. Cir. 1958); Dehler v. State, 22 Ind. App. 383, 53 N.E. 850, 853 (1899); Martin v. Bowdern, 158 Mo. 379, 59 S.W. 227, 231 (1900); Kohloff v. Bronx Savings Bank, 37 Misc. 2d 27, 233 N.Y.S. 2d 849, 850 (Spec. Term., Sup. Ct. 1962). *But cf.* Sherman v. State, 170 Ark. 148, 279 S.W. 353, 354 (1926) (the confession must be made under the practice or rules of the church to be privileged).

[600] People v. Brown, 82 Misc. 2d 115, 368 N.Y.S.2d 645, 651 (Trial Term, Sup. Ct. 1974).

[601] Commonwealth v. Zezima, 365 Mass. 238, 310 N.E.2d 590, 592 (1974).

[602] C. MCCORMICK, *supra* note 3, § 77, at 158.

[603] Simrin v. Simrin, 233 Cal. App. 2d 90, 43 Cal. Rptr. 376, 378-79 (Dist. Ct. App. 1965). *Contra*, Pardie v. Pardie, 158 N.W.2d 641, 645 (Iowa 1968); *see* notes 623 through 626 and accompanying text *infra*.

[604] Burger v. State, 238 Ga. 171, 231 S.E.2d 769, 771 (1977).

[605] United States v. Luther, 481 F.2d 429, 432 (9th Cir. 1973); State v. Lender, 266 Minn. 561, 124 N.W.2d 355, 358-59 (1963); Puglisi v. Pignato, 26 App. Div. 2d 817, 274

admissions of guilt made outside the context of seeking spiritual advice,[606] and documents entrusted to a clergyman for safekeeping where they are not direct communications to the clergyman are not protected.[607] Even when a privileged communication has been made, the clergyman may testify concerning his observations of the speaker such as state of mind or physical appearance.[608]

D. Effect of Third Persons

Section 13-1-22 permits intended disclosure of the communication to third persons if disclosure is in "furtherance of the purpose of the communication."[609] This situation is analogous to the privilege accorded experts consulted by a lawyer in rendering services for the client.[610] As with the attorney's privilege, however, this further disclosure should be made in connection with the spiritual advice sought or rendered. The privilege does not apply to situations such as the communicant's request that the clergyman transmit the communication to a third person[611] as an intermediary.[612]

Communications made in the presence of other members of the congregation are not privileged[613] unless the third persons are also "spiritual advisors."[614] An eavesdropper who happens to listen, however, may be prevented from divulging the communication if all other requirements of confidentiality under the statute are met.[615] The statutory

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N.Y.S.2d 213, 214 (App. Div. 1966). *But see In re* Verplank, 329 F. Supp. 433, 437-38 (C.D. Cal. 1971) (holding clergyman's records of draft counseling privileged).

[606] State v. Berry, 324 So. 2d 822, 828-29 (La.), *cert. denied*, 425 U.S. 954 (1976).

[607] Allen v. Linderman, 259 Iowa 1384, 148 N.W.2d 610, 615 (1967).

[608] *In re* Estate of Toomes, 54 Cal. 509, 516 (1880); Buuck v. Kruckeburg, 121 Ind. App. 262, 95 N.E.2d 304, 306-07 (App. 1950). *But see* Commonwealth v. Zezima, 365 Mass. 238, 310 N.E. 590, 592 (1974) ("communication" privileged where not "limited to conversation and includes other acts by which ideas may be transmitted from one person to another").

[609] MISS. CODE ANN. § 13-1-22(1)(b) (Supp. 1977).

[610] See note 292 and accompanying text *supra*.

[611] United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971); *cf.*, People v. Johnson, 270 Cal. App. 2d 204, 75 Cal. Rptr. 605, 606-07 (Ct. App. 1969) (privilege not applicable where communication is made in a situation other than a priest-penitent confidential relationship).

[612] Mitsunaga v. People, 54 Colo. 102, 129 P. 241, 244 (1913); Hills v. State, 61 Neb. 589, 85 N.W. 836, 838 (1901).

[613] Milburn v. Haworth, 47 Colo. 593, 108 P. 155, 156 (1910); Commonwealth v. Drake, 15 Mass. 154, 155 (1818).

[614] Rutkemeier v. Nolte, 179 Iowa 342, 161 N.W. 290, 292-93 (1917). Where an accused is guarded by a prison guard and there are no separate facilities to allow private communications, the presence of the officer in charge of custody does not destroy the privilege. People v. Brown, 82 Misc. 2d 115, 368 N.Y.S.2d 645, 650-51 (Trial Term, Sup. Ct. 1974).

[615] MISS. CODE ANN. § 13-1-22(2) (Supp. 1977).

privilege also extends to third persons such as secretaries and clerks of the clergyman who acquire knowledge of the communication in that role.[616]

The holder of the privilege may be the communicant himself, his guardian or, if the communicant is deceased, his personal representative.[617] The clergyman's authority to claim the privilege in the communicant's behalf is presumed unless the privilege has been waived.[618]

E. Federal Question Cases

Standard 506[619] is more similar to the Mississippi statute than the other testimonial privileges discussed in this Article. The definition of "clergyman" is broader under the standard in that it extends coverage to anyone reasonably believed to be a clergyman by the communicant,[620] but it does not cover all self-proclaimed ministers.[621] The clergyman must be regularly engaged in activities under an established religious denomination, "though not necessarily on a full time basis."[622] The general rule is identical to section 13-1-22 in that the communicant can prevent disclosure by himself, the clergyman, and eavesdroppers.[623] The clause making privileged those communications to the clergyman as a spiritual advisor, also identical to Mississippi's, is broader than that of

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[616] *Id.* § 13-1-22(4).

[617] *Id.* § 13-1-22(3).

[618] *Id.*

[619] FED. STANDARDS OF EVID. 506 provides:

(a) Definitions.—As used in this rule:

(1) A "clergyman" is a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege.—A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman in his professional character as spiritual adviser.

(c) Who may claim the privilege.—The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary.

[620] This is based on similar rules of the lawyer-client privilege and also the recognition of valid marriages performed by unauthorized persons who are reasonably believed to be qualified to do so. *Id.* 506(a), Advisory Comm. Note, *reprinted in* 2 WEINSTEIN'S EVIDENCE 506-2, -3 (1976).

[621] *Id.*

[622] *Id.*

[623] *Id.*

most American jurisdictions.[624] Unlike some states,[625] standard 506(2)(b), and probably Mississippi, would extend the privilege to marriage counseling and advice on personality problems if they are offered in the role of a spiritual advisor.[626]

Just as under section 13-1-22, communications to clerks and secretaries, even in the absence of the communicant, are privileged.[627] However, the privilege does not apply to this category of persons when the communication is made to the employee by one who is not a member of the clergyman's denomination.[628]

VII. The Accountant-Client Privilege

There was no accountant-client privilege at common law,[629] and the Mississippi Supreme Court has accordingly refused to recognize any such confidential communications privilege. In *Harrison v. Harrison*,[630] a divorce action, the lower court refused to require the husband to furnish his wife with subpoenaed copies of his federal income tax returns which were prepared by and in the possession of his accountant.[631] According to the supreme court,

> [n]o case has been cited to the contrary and we hold that, absent any statutory privilege, there is *no privilege* that would relieve a litigant in a divorce action from revealing to his or her spouse or counsel opposite copies of previously filed income tax returns where there is in dispute the financial condition of one or both of the parties.[632]

The court ultimately held the lower court's error harmless, however, since the Chancellor had rightfully denied alimony to the wife. Alluding further to the accountant's privilege, the court continued: "However, we point out that upon the facts and circumstances of this record, there was *no privilege* that should have prevented compelling the introduction of

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[624] 2 Weinstein's Evidence ¶ 506[03], at 506-11 (1976).

[625] See note 603 and accompanying text *supra*.

[626] *See* Fed. Standards of Evid. 506(b), Advisory Comm. Note, *reprinted in* 2 Weinstein's Evidence, at 506-3 (1976).

[627] *Compare* Fed. Standards of Evid. 506(a)(2), see note 619 *supra*, *with* Miss. Code Ann. § 13-1-22(4) (Supp. 1976), see note 564 *supra*.

[628] State v. Lender, 266 Minn. 561, 124 N.W.2d 355, 358 (1963).

[629] *See, e.g.*, Himmelfarb v. United States, 175 F.2d 924, 939 (9th Cir. 1949) (no privileged communication between accountant and client); *Ex parte* Frye, 155 Ohio St. 345, 98 N.E.2d 798, 803 (1951) (accountant can be compelled to produce client's private papers and documents no matter how confidential); Clayton v. Canida, 226 S.W.2d 264, 266 (Tex. Ct. App. 1949) (privilege does not exist where attorney-CPA acts in CPA capacity).

[630] 285 So. 2d 752 (Miss. 1973), *noted in* 45 Miss. L.J. 1073 (1974).

[631] 285 So. 2d at 755.

[632] *Id.* (emphasis added).

the copy of the tax return or furnishing the same to counsel opposite."[633] Nor is there a federal accountant-client privilege.[634] In line with this, the United States District Court for the Southern District of Mississippi has held that no such privilege arises solely from the accountant-client relationship.[635]

Communications to an accountant may become privileged if they are brought within another recognized privilege, such as the attorney-client privilege, if the accountant is employed by a lawyer to assist in the rendition of professional legal services.[636] If the attorney is also an accountant, and his services more closely resemble those performed by an accountant than by a lawyer, the lawyer-client privilege is inapplicable.[637]

VIII. Conclusion

It has been the effort of the authors to examine the interpersonal testimonial privileges recognized and enforced in the courts of Mississippi. Interpersonal privileges appear to be more than mere rules of evidence. Rather, they would seem to exist as a matter of right, similar to the constitutional privilege against self-incrimination, and as such, they affect the lawyer in the preparation of a case at all stages. Whether it be during the formation of the dispute or in arguing the case to the jury, the attorney must work with or around the privileges. The trial attorney must therefore conduct his discovery in light of these privileges

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[633] *Id.* (emphasis added).

[634] *E.g.*, Himmelfarb v. United States, 175 F.2d 924, 939 (9th Cir. 1949). *See generally* Couch v. United States, 409 U.S. 322, 335 (1973).

[635] United States v. Smith, 373 F. Supp. 14, 19 (S.D. Miss. 1974). Some states recognize the privilege by statute. *E.g.*, Colo. Rev. Stat. § 13-90-107(f) (1973); Fla. Stat. Ann. § 473.15 (West 1965); Mich. Stat. Ann. § 18.23 (1971); Tenn. Code Ann. § 62-143 (1976).

[636] 2 Weinstein's Evidence ¶ 503(a)(3)[01], at 503-24 (1976). *See generally* Peterson, *Attorney-Client Privilege in Internal Revenue Service Investigations*, 54 Minn. L. Rev. 67, 90-91 (1969).

[637] *See, e.g.*, Olender v. United States, 210 F.2d 795, 806 (9th Cir. 1954) (attorney-client privilege is limited to communications made by an attorney giving legal advice in his professional capacity); *In re* Fisher, 51 F.2d 424, 425 (S.D.N.Y. 1931) (work typically performed by accountants is not privileged, even if legal advice is incidentally given); Clayton v. Canida, 223 S.W.2d 264, 266 (Tex. Civ. App. 1949) (communication to attorney-CPA acting as CPA not privileged).

Although the question has never arisen in Mississippi, the general rule is that there is no architect/engineer-client privilege. *See, e.g.*, Mattson v. Cayuna Ore. Co., 178 F. Supp. 653, 654 (D. Minn. 1959) (no such privilege has been shown to exist). Mississippi has, however, refused to recognize any sort of parent-child privilege. *See* Powell v. Powell, 198 Miss. 301, 303, 22 So. 2d 160, 160 (1945) (fifteen-year-old permitted to testify for parent in divorce case); Parker v. McNeil, 20 Miss. (12 S. & M.) 355, 361-62 (1849) (daughter permitted to testify for mother in property dispute).

and must prepare and present his case with his decisions regarding the privileges as an integral part of his trial strategy. To approach trial preparation in any other manner could be devastating.

WITNESSES

*William J. Gunn**

The purpose of this Article is to discuss the Federal Rules of Evidence 601 to 615, dealing with witnesses. The author was initially aware of the quantity of materials on the federal rules dealing with witnesses. Such awareness is even keener now. Any complete discussion of the rules dealing with witnesses would be too voluminous to be treated in an article of this nature. One only has to look at the extensive legislative history of the rules and the comprehensive textual materials such as Judge Weinstein's excellent treatise, relied on extensively herein, to recognize this fact. No effort has been made to examine and report upon every case bearing upon the particular rule and its comparable Mississippi position. An effort has been made, however, to select those areas and cases for discussion which it is believed cast the most light upon the subject at hand and from which definite conclusions may be reached. If interest is stimulated or light shed which results in deeper thought and research, this Article will have served its purpose.

Rule 601. General Rule of Competency[1]

As originally submitted to Congress, rule 601 provided that the issue of competency[2] in all federal cases would be determined exclusively under the federal rules,[3] thereby rendering inapplicable state statutes and rules of competency which disqualify witnesses for reasons such as age, mental capacity, and application of Dead Man's Statutes.[4] Upon congressional determination that these statutes and rules represented justifiable state policies,[5] rule 601 was revised so that, in civil actions

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[1] Fed. R. Evid. 601 provides:

> Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

See Witnesses ⚿ 35-183½.

[2] In the law of evidence, competency is defined as "the presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony in a court of justice." Black's Law Dictionary 355 (rev. 4th ed. 1968).

[3] The proposed rule consisted of only the first sentence found in the present rule. H.R. Rep. No. 650, 93d Cong., 1st Sess. 2, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075, 7083.

[4] Dead Man's Statutes prevent a surviving party from testifying about facts which occurred during the life of a deceased adverse party. *See, e.g.*, Miss. Code Ann. § 13-1-7 (1972).

[5] H.R. Rep. No. 650, *supra* note 3, at 2.

where state law supplies the rule of decision, the competency of witnesses will also be determined by state law.[6]

The competency issue in federal criminal actions is determined solely by the federal rules.[7] Prior to the adoption of the Federal Rules of Evidence, the competency of a witness in federal criminal cases was governed by common law principles as interpreted by the federal courts.[8] Thus, under prior law, a witness could be barred from testifying because of mental or moral disqualifications, religious beliefs, criminal convictions, or connections with the litigation.[9] Rule 601 effectively repealed these common law grounds of incompetency in federal criminal trials.[10]

In civil actions based on diversity jurisdiction,[11] state laws of competency apply under rule 601, except where the testimony relates to a federal claim or defense.[12] If the action is founded on jurisdiction other than diversity of citizenship, the federal rules of competency govern even though state law is incorporated into the decision.[13] Competency of witnesses in civil cases was previously governed by the Federal Rules of Civil Procedure,[14] which provided that the testimony of a witness was competent if admissible under federal statutes, rules of evidence previously applied in federal equity suits, or rules of evidence of the forum state.[15] In keeping with the trend of limiting rules which disqualify wit-

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[6] FED. R. EVID. 601.

[7] The law of competency under the federal rules is generally embodied in the first sentence of rule 601, which provides that all persons are competent as witnesses except as otherwise provided in the rules. The exceptions are found in rules 603 (where witness refuses to declare that he will testify truthfully), 605 (where witness is the presiding judge), and 606 (where witness is a member of the jury hearing the case). In these three situations, a person is deemed incompetent to testify.

[8] FED. R. CRIM. P. 26 (1970) (amended 1972 to delete reference to common law principles).

[9] FED. R. EVID. 601, Advisory Comm. Notes.

[10] *See* FED. R. CRIM. P. 26, Advisory Comm. Notes (reference to common law deleted because rules of evidence now govern).

[11] See 28 U.S.C. § 1332 (1970).

[12] Federal rules of competency apply to federal claims or defenses. FED. R. EVID. 601.

[13] In Board of County Comm'rs v. United States, 308 U.S. 343 (1939), the Court held that a federal court had discretion to "absorb" state law when called upon to make federal law. *Id.* at 351-52; *see* DeSylva v. Ballentine, 351 U.S. 570, 580-81 (1956) (meaning of term in federal statute may be determined by reference to state law); Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946) (federal rule fashioned out of combination of federal and state rules); D'Oench-Duhme & Co. v. FDIC, 315 U.S. 447, 471-72 (1942) (Jackson, J., concurring) (federal court in nondiversity suit may draw upon all common law sources). *See generally* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 60, at 282-85 (3d ed. 1976).

[14] FED. R. CIV. P. 43, Advisory Comm. Notes.

[15] FED. R. CIV. P. 43(a).

nesses,[16] rule 601 now allows the use of state competency law only where state law supplies the rule of decision. In all other federal cases, a person is competent unless he is a judge or juror hearing the case, or refuses to declare that he will testify truthfully.[17]

The Mississippi counterpart to rule 601 is section 13-1-3 of the Mississippi Code.[18] Although Mississippi has abolished several common law grounds for incompetency,[19] it still disqualifies three classes of witnesses. In controversies where only one spouse is a party, the other is not competent as a witness without the consent of both.[20] The second disqualification prohibits testimony to establish a claim or defense against the estate[21] of a deceased person, or one with an unsound mind, or one adjudicated non compos mentis.[22] Finally, a person convicted of perjury or subornation of perjury is thereafter incompetent to testify, even though he has been pardoned or has served his punishment.[23]

Other Mississippi statutory provisions abolish common law rules of incompetency by declaring certain classes of persons competent to tes-

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[16] C. McCormick, Handbook of the Law of Evidence § 71, at 150 (2d (E. Cleary) ed. 1972).

[17] See note 7 *supra*.

[18] "Every person, whether a party to the suit or not, shall be competent to give evidence in any suit at law or in equity . . . ." Miss. Code Ann. § 13-1-3 (1972).

[19] See notes 24 through 27 and accompanying text *infra*.

[20] Miss. Code Ann. § 13-1-15 (1972); *see* Wallace v. State, 254 Miss. 944, 947, 183 So. 2d 525, 526 (1966) (consent of both husband and wife required before one spouse can testify against the other); Whitney Nat'l Bank v. Stirling, 177 Miss. 325, 338, 170 So. 692, 693 (1936) (no due process violation of opposing party's rights even if inability to call spouse denies that party of material evidence). Section 13-1-5 provides that spouses are competent to testify for or against each other in controversies between them, including criminal prosecutions for contributing to the neglect or delinquency of a child, or for desertion, nonsupport, or abandonment of children. The subjects of marital competency and marital privileges are treated extensively in Caraway & Currie, *Privileges*, 48 Miss. L.J. 989 (1977).

[21] The court seems to be limiting this restriction. *See, e.g.*, Hawkins v. Rye, 253 Miss. 132, 143-45, 101 So. 2d 516, 520-22 (1958) (defense of wrongful death action has no direct effect on the "estate"). *See generally* Pope, *Applicability of the Dead Man's Statute to Negligence Actions in Mississippi*, 33 Miss. L.J. 72 (1961).

[22] Miss. Code Ann. § 13-1-7 (1972) (commonly referred to as the Dead Man's Statute); *see In re* Marshall, 243 Miss. 472, 477, 138 So. 2d 482, 483 (1962) (widow held incompetent to testify in suit to set aside husband's will); Brown v. Parker, 143 Miss. 291, 298, 108 So. 492, 493 (1926) (incompetency extends to all matters which occurred during the deceased's lifetime). *But cf.* Jenkins v. Jenkins, 232 Miss. 879, 884, 100 So. 2d 789, 791 (1958) (party is competent to testify where statement at issue occurred after decedent's death); Manning v. Hammond, 234 Miss. 299, 306-08, 106 So. 2d 51, 55 (1958) (party against whom claim is made waives competency objection by calling claimant as a witness). *See generally* Coker, *Competency of a Defendant to Testify When Sued Under the Wrongful Death Statute*, 29 Miss. L.J. 258 (1958); Comment, *An Analysis of the Mississippi Dead Man Statute*, 40 Miss. L.J. 121 (1968). See Witnesses ⚿ 125-183½.

[23] Miss. Code Ann. § 13-1-11 (1972).

tify. Thus, a party is not deemed incompetent because of his interest in the suit;[24] the accused in a criminal trial is competent to testify;[25] and a person is not rendered incompetent because of any religious belief or lack of religious belief.[26] In all cases not provided for by statute, the trial judge has discretion to rule on the competency issue, based on his determination of whether the witness has the ability to understand and answer questions and the capacity to observe and recall events.[27]

RULE 602. LACK OF PERSONAL KNOWLEDGE[28]

The common law premise that only the most reliable sources of information available should be admissible[29] is codified in rule 602. A witness may therefore testify only as to matters of personal knowledge[30] perceived through one of the witness' physical senses.[31] The trial judge has limited discretion to exclude testimony upon determining, as a matter of law, that the witness could not possibly have obtained sufficient knowledge of the matter about which he is attempting to testify.[32] If any possibility exists that the witness observed the events, the judge should allow the testimony and leave the question of credibility to the jury.[33]

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[24] *Id.* § 13-1-3. A person's interest in the outcome of the suit may, however, be considered in determining what weight to accord his testimony. *Id.* See Witnesses ⚿ 80-124, 363-78.

[25] MISS. CODE ANN. § 13-1-9 (1972). Failure of the accused to testify may not be used against him. *Id.*

[26] *Id.* § 13-1-15.

[27] The trial judge's discretion is not unlimited. *See* Butler v. State, 217 Miss. 40, 51, 63 So. 2d 779, 781 (1953) (although determination of witness' mental capacity is within court's discretion, denial of motion for preliminary examination of principal witness was reversible error).

[28] FED. R. EVID. 602 provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

See Witnesses ⚿ 37.

[29] C. MCCORMICK, *supra* note 16, § 10, at 20.

[30] United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976), *cert. denied*, 97 S. Ct. 1122 (1977).

[31] *See* Fox v. Order of United Commercial Travelers, 192 F.2d 844, 846 (5th Cir. 1952) (wife who heard gun shot and was aware of surrounding circumstances was "eyewitness," *i.e.* one who hears, feels, tastes, smells, or sees an occurrence).

[32] Mogavero v. United States, 336 F.2d 376, 378 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965).

[33] 3 WEINSTEIN'S EVIDENCE ¶ 602[02], at 602-6 (1976); *see* United States v. Evans, 484 F.2d 1178, 1181-82 (2d Cir. 1973) (question of eyewitness identification is not an issue of admissibility but is one of credibility and thus for the jury).

A party seeking to introduce testimony through a witness must first produce sufficient evidence, through the testimony of that witness or otherwise, to show the witness has personal knowledge of the matter about which he is testifying.[34] A sufficient foundation does not require that the witness have absolute knowledge of the event, but merely that the witness had a reasonable opportunity to observe, that he did in fact observe, and that he has some recollection of the event.[35] Rule 602 is subject to the exception stated in rule 703 that an expert witness may give an opinion based on facts of which he has no personal knowledge and which may be inadmissible.[36]

Although Mississippi has no statute equivalent to rule 602, case law adheres to the basic position that a witness is competent to testify about facts within personal knowledge, perceived through the physical senses.[37]

Rule 603. Oath or Affirmation[38]

Common law required that a witness make an oath to God before testifying, on the theory that the divine retribution commonly believed to result if one failed to observe the oath would induce the witness to testify truthfully.[39] This requirement rendered incompetent witnesses whose religious belief precluded them from taking an oath, those who had no belief in God, and those whose mental capacity was insufficient to understand the gravity of such an oath.[40] The modern approach taken by rule 603 abolishes the necessity for reference to the Diety, and substitutes a more flexible standard, merely requiring the witness to affirm that he will tell the truth.[41] Reversing prior law, the rules now allow testimony by persons whose religious beliefs prevent them from taking

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[34] Fed. R. Evid. 602.

[35] *See, e.g.*, Pass v. Firestone Tire & Rubber Co., 242 F.2d 914, 918 (5th Cir. 1957) (witness could testify that attendant put air in tire even though he was not certain); O'Shea v. Jewel Tea Co., 233 F.2d 530, 534 (7th Cir. 1956) (blind, senile doctor competent to testify about things within his memory, even though recollection was incomplete).

[36] Fed. R. Evid. 602, 703; Farres v. Interstate Circuit, 116 F.2d 409, 412 (5th Cir. 1941). *See also* 3 Weinstein's Evidence ¶ 703[02], at 703-7 to -21 (1976).

[37] *See, e.g.*, Perkins v. State, 290 So. 2d 597, 599 (Miss. 1974) (witness who was 150 yards from murder scene and who heard screams and sounds of beating held competent); Dennis v. Prisock, 221 So. 2d 706, 710-11 (Miss. 1969) (plaintiff in tort action competent to describe pain she felt following accident).

[38] Fed. R. Evid. 603 provides: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." See Witnesses ⚷ 44, 227.

[39] United States v. Looper, 419 F.2d 1405, 1406 n.2 (4th Cir. 1969).

[40] *Id.*

[41] Fed. R. Evid. 603.

an oath[42] and by persons who do not believe in God.[43] Regardless of this flexibility, the affirmation requirement is absolute, and failure to indicate an intent to tell the truth will disqualify a potential witness.[44]

The federal and state positions are virtually identical.[45]

RULE 604. INTERPRETERS[46]

Rule 604 does not specify the circumstances which prompt the use of an interpreter, and indeed, determination of whether an interpreter should be appointed has long been left to the discretion of the trial judge.[47] An interpreter is necessary when the witness cannot understand the questions or express the answers to the judge and jury.[48] These situations occur most often in three instances: where the witness must communicate nonverbally, where the witness cannot speak or comprehend English, and where the witness is unable or unwilling to speak so as to be heard by the court.[49] Weinstein suggests that an interpreter should also be appointed if there is any doubt as to the witness' ability to understand, such as where the witness speaks English but may not be sufficiently fluent to discern subtle lingual distinctions.[50]

The rule does not specify who will act as interpreter; the issue is

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[42] Moore v. United States, 348 U.S. 966, 966 (1955) (per curiam).

[43] Gillars v. United States, 182 F.2d 962, 969-70 (D.C. Cir. 1950).

[44] FED. R. EVID. 602; United States v. Fiore, 443 F.2d 112, 115 (2d Cir. 1971), *cert. denied*, 410 U.S. 984 (1973).

[45] *Compare* FED. R. EVID. 603 *with* MISS. CODE ANN. § 13-1-17 (1972) *and* Hunter v. State, 137 Miss. 276, 296, 102 So. 282, 288 (1924) (acknowledging competence of witness who "had no proper conception of the existence of a state of rewards and punishments" and who "knew nothing of the legal consequences following perjury").

[46] FED. R. EVID. 604 provides: "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation." *Cf. id.* 603, 702. *See generally* Gray & Hammond, *Experts*, 49 MISS. L.J. (1978).

[47] Perovich v. United States, 205 U.S. 86, 91 (1907). The judge's discretion is limited by the concept of basic fairness. For example, in criminal prosecutions of non-English-speaking defendants, the judge should appoint an interpreter and require him to translate all that is said in order to satisfy the due process clause. *See* United States *ex rel.* Negron v. New York, 434 F.2d 386 (2d Cir. 1970), *discussed in* 3 WEINSTEIN'S EVIDENCE ¶ 604[01], at 604-3 to -6 (1976). *But see* United States v. Desist, 384 F.2d 889, 901-03 (2d Cir. 1967) (failure to provide interpreter at government's expense not denial of due process where defendant was not indigent and law firm retained by him included a partner who spoke the defendant's language), *aff'd*, 394 U.S. 244 (1969).

[48] *See, e.g.*, United States v. Frank, 494 F.2d 145, 157 (2d Cir.) (use of interpreter proper even though witness could speak English and relied on interpreter mainly during cross-examination), *cert. denied*, 419 U.S. 828 (1974).

[49] *See* 3 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 811, at 279-80 (Chadbourn rev. 1970).

[50] 3 WEINSTEIN'S EVIDENCE ¶ 604, at 604-2 to -3 (1976).

left to the trial judge's discretion. In most cases, the court should appoint someone who has no connection with the case.[51] The only limitations on authority to appoint an interpreter of the judge's choice are that the appointee qualify as an expert in the particular communication skills required and make an oath or affirmation to translate truthfully.[52]

Section 11-7-153 of the Mississippi Code provides for the use of interpreters in state court when necessary.[53] Mississippi follows the same position as rule 604 that an interpreter must declare that a true translation will be given before interpretation may begin.[54] The Mississippi position differs from rule 604, however, in that our state courts do not require the interpreter to qualify as an expert.[55] A person need only show that he can communicate with the witness well enough to give an accurate interpretation of what is said.[56] Refusal to allow a witness to testify through a competent interpreter is considered reversible error if such refusal deprives a party of material evidence.[57] Mississippi also takes the position that, although a completely disinterested interpreter is preferred, a person's relationship to the litigation does not preclude him from acting as an interpreter.[58]

Rule 605. Competency of Judge as Witness[59]

At common law a judge was permitted to leave the bench and become a witness in a case over which he presided.[60] Although later rules limited a sitting judge's testimony to immaterial matters, the modern view is that a judge may not testify in his own court without specific

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[51] *Id.* at 604-3.

[52] Fed. R. Evid. 604.

[53] Miss. Code Ann. § 11-7-153 (1972). *See also id.* § 13-1-16 (court may appoint interpreter for a deaf person).

[54] *Id.* § 11-7-153. The same procedure is followed in criminal trials. *See id.* § 99-17-7.

[55] *See* Bugg v. Town of Houlka, 122 Miss. 400, 405-07, 84 So. 387, 387-88 (1920) (use of interpreter functionally skilled in communicating with deaf-mutes permissible, even though he could not interpret everything).

[56] *Id.* at 406, 84 So. at 388.

[57] *See, e.g.,* Morse v. Phillips, 157 Miss. 452, 455, 128 So. 336, 337 (1930) (where deaf-mute's only means of expression was through his daughter's translations, to reject her as an interpreter was reversible error).

[58] *Id.* In *Morse,* the court held that the trial court erred in rejecting the daughter of the plaintiff as an interpreter on the grounds that she was related, interested, and a witness in her own person, since such objections "go merely to the credibility of the translation and not to the competency of the interpreter." *Id.*

[59] Fed. R. Evid. 605 provides: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." See Judges ⚿ 50; Witnesses ⚿ 68-71.

[60] Brashier v. State, 197 Miss. 237, 241, 20 So.2d 65, 66 (1944), *noted in* 97 C.J.S. *Witnesses* § 105, 514 n.50 (1957).

statutory grant.[61] Under federal law, there is no such grant. In fact, besides rule 605, 28 U.S.C. § 455[62] requires that a judge be disqualified from any case in which he is or has been a material witness. Although the judge is granted discretion to determine when he should disqualify himself because of his interest as a witness, judicial interpretation of the statute sweeps broadly, requiring the judge to avoid even the appearance of partiality.[63] While section 455 requires a presiding judge to disqualify himself in the great majority of instances in which he is called as a witness, the possibility exists for the judge to rule that his testimony is immaterial, thus allowing him to testify in a case being tried in his court.[64] Such an occurrence would raise serious questions about the conduct and fairness of the trial, including who would rule on objections to the judge's testimony, who could compel him to answer questions, whether his appearance would prejudice the jury, and whether he could remain impartial.[65] Rule 605 alleviates these potential conflicts by providing a blanket rule of incompetency for presiding judges.[66] A judge should then recuse himself from any case where he has sufficient knowledge of the facts to be a potential witness.[67] Recusal seems the most logical course for a judge whose testimony may be relevant since the party seeking his testimony may be denied material evidence if the judge remains on the case and invokes rule 605.[68]

Although there is no legislative provision in Mississippi specifically disallowing testimony from a presiding judge, there are several constitutional and statutory provisions which prevent a judge from presiding over a case in which he has an interest.[69] The laws also anticipate the

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[61] C. McCORMICK, *supra* note 16, § 68, at 148 n.77.

[62] (Supp. IV 1974).

[63] *See, e.g.*, Texaco, Inc. v Chandler, 354 F.2d 655, 657 (10th Cir. 1965) (judge prohibited under section 455 from further conduct of trial where plaintiff's attorney had represented the judge in prior litigation), *cert. denied*, 383 U.S. 936 (1966); Rapp v. Van Dusen, 350 F.2d 806, 812 (3d Cir. 1965) (although not deciding that section 455 applied, the court stated that "[t]he proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality"); *cf.* ABA CODE OF JUDICIAL CONDUCT Canon 2 (1972) (judge should not testify as character witness).

[64] FED. R. EVID. 605, Advisory Comm. Notes.

[65] *Id. See generally* 3 WEINSTEIN'S EVIDENCE ¶ 605[01], at 605-4 (1976).

[66] FED. R. EVID. 605. Since the rule provides an "automatic" objection, the opponent is not placed in the difficult position of having to determine whether to silently permit the judge's testimony to the possible prejudice of his client, or to object to the testimony, and thereby possibly become the judge's adversary. FED. R. EVID. 605, Advisory Comm. Notes.

[67] *See* 3 WEINSTEIN'S EVIDENCE ¶ 605[02], at 605-6 (1976).

[68] A judge faced with this situation should recuse himself prior to the trial since there is no provision in a civil case for judicial replacements except to enter judgment pursuant to FED. R. CIV. P. 63. For replacement judges in criminal cases, see FED. R. CRIM. P. 25(a).

[69] *See* MISS. CONST. art. 6, §§ 165, 171 (disqualification for interest in a case or the parties); MISS. CODE ANN. § 9-1-11 (1972) (exception where parties and judge consent).

appointment of a replacement judge[70] and allow removal of the case to another judicial district for trial.[71]

The competency issue was addressed by the Mississippi Supreme Court in *Brashier v. State.*[72] The presiding judge in *Brashier* had warranted the search of the defendant's property which produced contraband. His testimony at the trial about the facts supporting issuance of the warrant and about the defendant's statements at a bond hearing were held to be reversible error. The Mississippi Supreme Court held that since the duties of a judge and a witness are incompatible, a judge may not testify to the merits of a case in which he sits.[73] Furthermore, a judge should recuse himself from any case in which he might be called as a witness. Even without advance notice, a judge must refuse to testify.[74] Although not expressly founded on statute,[75] the resultant Mississippi position on incompetency of presiding judges is essentially the same as that expressed in rule 605.[76]

Rule 606. Competency of Juror as Witness[77]

Rule 606 relates the competency of a juror to be a witness in federal court. Subdivision (a) prohibits testimony from any member of the jury

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[70] Miss. Code Ann. §§ 91-1-13, -15, 11-1-11 (1972).

[71] *Id.* § 11-11-19.

[72] 197 Miss. 237, 20 So. 2d 65 (1944).

[73] *Id.* at 241-43, 20 So. 2d at 66-67.

[74] *Id. See also* Duggan v. Board of Supervisors, 207 Miss. 854, 859-60, 43 So. 2d 566, 568 (1949) (en banc) (board of supervisors sitting as a court properly refused to allow themselves to be cross-examined as witnesses).

[75] The *Brashier* court alluded to Miss. Code Ann. § 1530 (1942) (currently codified at Miss. Code Ann. §§ 11-7-155, 99-17-35 (1972)) which prohibited the trial judge from commenting on the testimony, charging the jury as to the weight of the evidence, or instructing the jury orally, as an implied basis for the decision. 197 Miss. at 243, 20 So. 2d at 67.

[76] *Brashier* also held that the objection to the judge's testimony was not waived merely because it was not made until after the testimony was given. 197 Miss. at 237, 20 So. 2d at 67. This holding parallels the "automatic objection" provided for by rule 605.

[77] Fed. R. Evid. 606 provides:

> (a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
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> (b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear

in a given case, while subdivision (b) pertains to a grand or petit juror testifying upon inquiry into the verdict or indictment. Although rule 606(a) provides a blanket prohibition against jurors testifying, the rule does not prescribe the procedure to be followed if testimony of the juror is sought during the trial. A juror's knowledge of a case should be brought out on voir dire and the juror excused.[78] This probably accounts for the lack of reported cases in which a juror's testimony is requested. In fact, no reported federal case has dealt with the issue of a juror testifying during the course of a trial.[79] If it becomes known that a juror's testimony may be relevant after the jury has been empaneled and the case begun, the procedure to be followed will depend on the circumstances. Where the juror's testimony is not material, the judge may simply disallow it.[80] But, where the judge determines that other members of the jury were aware that the juror's testimony was sought or that the juror might have divulged his knowledge of the case to and prejudiced the jury, he can excuse the juror and replace him with an alternate.[81] If no alternate juror is available, the judge should declare a mistrial where there is indication of jury prejudice or where it is determined after the trial has begun that a juror's testimony is material to the litigation.[82]

Rule 606(b) seeks to determine what evidence will be competent from a juror who is testifying to the validity of a verdict reached by the jury on which he served.[83] It was a principle well settled by Lord Mansfield in English common law that testimony by a juror could not be heard to impeach his own verdict.[84] This rule has been retained in vir-

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upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

See Criminal Law ⚿ 868, 957; Federal Civil Procedure ⚿ 2191, 2337, 2371; Trial ⚿ 344; Witnesses ⚿ 68, 70, 73.

[78] 6 J. WIGMORE, *supra* note 49, § 1910, at 771 (1976).

[79] 3 WEINSTEIN'S EVIDENCE ¶ 606[02], at 606-20 (1976).

[80] *Id.* at 606-21. This method is most applicable where the offer of testimony was made outside the presence of the jury. *Id.*

[81] *Id.* See FED. R. CIV. P. 47(b); FED. R. CRIM. P. 24(c).

[82] 3 WEINSTEIN'S EVIDENCE ¶ 606[02], at 606-22 (1976). The rationale for declaring a mistrial may be more compelling in a criminal case because of the defendant's right to confront witnesses against him. *Id.* at 606-21, -22 (reviewing Parker v. Gladden, 385 U.S. 363 (1966) (per curiam)).

[83] *See generally* Comment, *To Impeach or Not to Impeach: The Stability of Jury Verdicts in Federal Courts,* 4 PEPPERDINE L. REV. 343 (1977).

[84] In Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785), *quoted in* C. MCCORMICK, *supra* note 16, § 68, at 148 n.80, Lord Mansfield said:

> The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor; but in every such case the Court must derive their knowledge from some other source, such as some person having seen the transaction through a window or by some such other means.

tually every American jurisdiction.[85] Its continued vitality was grounded on the premise that to hold otherwise would subject jurors to possible harassment about their verdicts, thereby restricting their freedom of deliberation and undermining the finality of the verdict.[86] It can be argued, however, that to prohibit inquiry into the jury's deliberations in all cases would only encourage irregularity in the deliberations and promote injustice.[87] Rule 606(b) attempts to strike a compromise between these conflicting theories.[88] While the rule prohibits testimony from a juror about any internal matter or incident which occurs during the jury's deliberations,[89] a juror may testify and divulge any extraneous information or outside influence which affected the deliberations.[90]

The prohibitions reflected in rule 606(b) apply only after a verdict has been reached by the jury. Therefore, a judge is not prevented from questioning a jury about an ambiguous or inconsistent verdict.[91] Whether counsel may interrogate jurors is not touched upon by the rule or its comments. The Code of Professional Responsibility allows attorneys to investigate jury conduct by interviewing jurors after trial without supervision of the court.[92] Federal trial judges, however, may, and often do, require that any investigation into possible jury misconduct be

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[85] *E.g.*, Prussel v. Knowles, 5 Miss. (4 How.) 90, 95 (1839); People v. Deegan, 88 Cal. 602, 26 P. 500 (1891). *See also* 8 J. WIGMORE, *supra* note 49, § 2354.

[86] McDonald v. Pless, 238 U.S. 261, 267-68 (1915); *accord,* Davis v. United States, 47 F.2d 1071, 1072 (5th Cir. 1931) (per curiam).

[87] FED. R. EVID. 606(b), Advisory Comm. Note.

[88] *Id.;* 3 WEINSTEIN'S EVIDENCE ¶ 606[03], at 606-24 (1976).

[89] FED. R. EVID. 606(b). The jurors' deliberations are analogized to prior negotiations of the parties to a contract; both disappear from legal consideration once the final agreement is reduced to writing. 8 J. WIGMORE, *supra* note 49, § 2348, at 680.

[90] FED. R. EVID. 606(b). The rule is consistent with case law prior to adoption of the rules of evidence. *See, e.g.,* Hyde v. United States, 225 U.S. 347, 381-82 (1912) (juror's testimony inadmissible to show compromise or coerced verdict); Holden v. Porter, 405 F.2d 878, 879 (10th Cir. 1969) (testimony incompetent to show jury considered insurance coverage in reaching its verdict); Farmers Coop. Elevator Ass'n Non-Stock v. Strand, 382 F.2d 224, 230 (8th Cir.) (juror incompetent to testify that jurors misunderstood the judge's instructions), *cert. denied,* 389 U.S. 1014 (1967). The rule's exceptions also accord with judicial precedent. *See, e.g.,* Parker v. Gladden, 385 U.S. 363, 365 (1966) (juror permitted to testify that remarks prejudicial to the defendant were made to the jury by the bailiff); Mattox v. United States, 146 U.S. 140, 151 (1892) (juror's testimony admissible that newspaper accounts of the trial were shown to the jury during deliberations).

[91] "It has long been well settled that the affidavit of a juror is admissible to show the true verdict or to show that no verdict was reached at all." Fox v. United States, 417 F.2d 84, 89 (5th Cir. 1969).

[92] ABA CODE OF PROFESSIONAL RESPONSIBILITY Ethical Consideration 7-30 (1969) states: "Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint."

performed only under the court's supervision,[93] and these strictures are often formally adopted as local rules.[94]

Mississippi statutes specify the qualifications and method of selection for grand and petit jurors.[95] No one may serve as a juror at any term of court during which he has a case pending in that court.[96] This does not restrict a juror from testifying in a case in which he has no interest and, indeed, the Mississippi Supreme Court's original position allowed such testimony.[97] That rule seems to have been rendered invalid in *Lucas v. State*,[98] in which the trial judge held substantially in accord with the federal rule.[99] Similarly, there is no statutory equivalent of rule 606(b), although decisions have established that no juror can impeach a verdict rendered by the jury on which he sits, either through testimony or affidavit.[100]

RULE 607. WHO MAY IMPEACH[101]

Credibility has been characterized as a two-dimensional concept. The first dimension concerns the possibility of a witness' mistake or unintentional misrepresentation; the second anticipates a deliberate and corrupt misrepresentation.[102] The right to impeach or to attack a witness' credibility is considered the most valid safeguard for providing the trier of fact complete access to the truth.[103] Since the sole purpose

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[93] Miller v. United States, 403 F.2d 77, 82 (2d Cir. 1968).

[94] In the United States District Court for the Northern District of Mississippi, Rule G-3 prohibits questioning a juror after his discharge unless the questioner has applied to the trial judge, shown good cause for an investigation, and received an order from the judge granting permission for an investigation. Rule 16 is to the same effect in the United States District Court for the Southern District of Mississippi. Rules of both courts are reprinted in THE MISSISSIPPI ATTORNEY'S DESK BOOK ND-2, SD-12 (2d ed. 1977).

[95] MISS. CODE ANN. §§ 13-5-1 to -95 (1972).

[96] *Id.* § 13-5-1.

[97] White v. State, 73 Miss. 50, 51, 19 So. 97, 98 (1895).

[98] 211 Miss. 339, 51 So. 2d 583 (1951).

[99] *Id.* at 341, 51 So. 2d at 584.

[100] *See* Ratliff v. Nail, 231 So. 2d 798, 800 (Miss. 1970) (juror's testimony that he viewed scene without court supervision held inadmissible to impeach verdict); Index-Drilling Co. v. Williams, 242 Miss. 775, 789, 135 So. 2d 525, 530 (1962) (affidavits by juror as to how jury reached verdict held inadmissible).

[101] FED. R. EVID. 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him."

[102] Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME LAW. 758, 759 (1975).

[103] Comment, *Impeachment*, 21 LOY. L. REV. 346, 346 (1975); *see, e.g.*, United States v. Harvey, 547 F.2d 720, 722-24 (2d Cir. 1976) (reversible error not to allow evidence of the bias of an identifying witness); United States v. Partin, 493 F.2d 750, 762 (5th Cir. 1974) (trial court should allow development of competent evidence which shows a motive for false testimony).

of impeachment is to aid the jury in determining whose testimony to believe,[104] evidence used for impeachment purposes is not relevant to establish the existence of a fact in dispute.[105]

Professor McCormick has pointed out that there are five bases for impeachment: (1) proof of a prior inconsistent statement, (2) a showing of bias, prejudice, or interest, (3) attack upon the character of the witness, (4) showing a defect in the witness' ability to observe, remember, or recount the subject of his testimony, and (5) contradiction by other witnesses.[106] The federal rules, however, address only impeachment by proof of prior statements[107] and character[108] as means of impeachment per se. Omission of an impeachment rule based on bias, prejudice, or interest has been criticized as a failure to reconcile a conflict in federal case law over both content and methodology of this form of impeachment.[109] One may view this failure even more critically in light of the fact that, because the several traditional incompetency rules have been abolished,[110] the party or witness is now permitted to testify even though an obvious interest or motive exists.[111] Evidence of defects in the sensory or mental capacity of a witness is treated as an attack on competency,[112] but not as a ground for impeachment.[113] Contradiction of a witness' testimony is likewise left to determination according to case law.[114]

A threshold question in determining whether a witness may be impeached is the relationship of the witness to the impeaching party. Under traditional common law principles, a party was prohibited from

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[104] Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 1029 (1968).

[105] United States v. Crowder, 346 F.2d 1, 4 (6th Cir.), *cert. denied,* 382 U.S. 909 (1965); Brooks v. United States, 309 F.2d 580, 582 (10th Cir. 1962).

[106] C. McCormick, *supra* note 16, § 33, at 66.

[107] See notes 254 through 264 and accompanying text *infra.*

[108] See notes 133 through 157 & 172 through 182 and accompanying text *infra.*

[109] Schmertz & Czapanskiy, *Bias Impeachment and the Proposed Federal Rules of Evidence,* 61 Geo. L.J. 257, 257-58 (1972).

[110] See notes 7 through 17 and accompanying text *supra.*

[111] Schmertz & Czapanskiy, *supra* note 109, at 259.

[112] Competency is addressed in terms of personal knowledge. *See* Fed. R. Evid. 602.

[113] The threshold issue of competency is a question of law which lies exclusively in the trial court's discretion, whereas the jury must determine the credibility of the witness. United States v. Gerry, 515 F.2d 130, 137 (2d Cir.), *cert. denied,* 423 U.S. 1031 (1975). Thus, where a witness is held competent to testify despite mental "abnormality," evidence of such condition is admissible to attack the witness' credibility. *Id. See generally* C. McCormick, *supra* note 16, § 45, at 93-97.

[114] A witness may be contradicted on a material point by the testimony of other witnesses showing a contrary state of facts. United States v. Halperin, 441 F.2d 612, 617 (5th Cir. 1971). This impeachment technique obviates the necessity of laying a foundation. Stamicarbon v. Escambia Chem. Corp., 430 F.2d 920, 929 (5th Cir.), *cert. denied,* 400 U.S. 944 (1970).

impeaching his own witnesses.[115] Although its origin is uncertain,[116] the rule still persists in some form in most jurisdictions.[117] Even where the prohibitory rule has been abandoned, most courts require that the party seeking impeachment must show that he is surprised by the testimony[118] and that it is damaging to his cause.[119] Justification for the rule's continuance has been two-fold: (1) the calling party is presumed to vouch for a witness' veracity, and (2) were the rule abolished, the party calling a witness would be in a position to control the testimony.[120] The validity of the "voucher" rule was seriously questioned in *Chambers v. Mississippi,*[121] where the trial court had refused to allow the defendant in a murder prosecution to cross-examine his witness who had recanted confessing to the crime. The Supreme Court held that such refusal, which had been based on the voucher rule, deprived the defendant of a fair trial.[122] Similarly, the second rationale, the control theory, has been criticized as a "fanciful psychological speculation,"[123] which operates on the presumption that dishonest lawyers will use the threat of impeach-

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[115] C. McCORMICK, *supra* note 16, § 38, at 75.

[116] *See* Ladd, *Impeachment of One's Own Witness—New Developments,* 4 U. CHI. L. REV. 69, 69 (1936) (rule seems to have roots in trial by compurgation).

[117] C. McCORMICK, *supra* note 16, § 38, at 75-78.

[118] The apparent rationale of this limitation is to prevent use of the rule as a subterfuge to get to the jury evidence otherwise inadmissible. *See, e.g.,* United States v. Morlang, 531 F.2d 183, 189-90 (4th Cir. 1975) (error to allow government to impeach its witness for sole purpose of placing witness' prior inconsistent statement before the jury); United States v. Allsup, 485 F.2d 287, 292 (8th Cir. 1973) (prior inconsistent statement of witness was improperly admitted where prejudice to the defendant resulted); United States v. Coppola, 479 F.2d 1153, 1156-58 (10th Cir. 1973) (impeachment cannot be used to introduce hearsay evidence where the jury may confuse that evidence with substantive proof); Mississippi v. Durham, 444 F.2d 152, 156 (5th Cir. 1971) (extrajudicial statement recorded on tape and used for impeachment purposes is hearsay and should not be admitted as substantive evidence); Doss v. United States, 431 F.2d 601, 604-05 (9th Cir. 1970) (prior written statement can be used for impeachment but not as substantive proof); Goings v. United States, 377 F.2d 753, 762-63 (8th Cir.) (although admissiblity is in a trial court's discretion, when evidence is traditionally unworthy or unreliable, it should not be allowed), *cert. denied,* 393 U.S. 883 (1967).

[119] Young v. United States, 97 F.2d 200, 206 (5th Cir. 1938).

[120] C. McCORMICK, *supra* note 16, § 38, at 75.

[121] 410 U.S. 284 (1973).

[122] *Id.* at 309-13. Many other cases discredit the voucher rule; *see, e.g.,* United States v. Norman, 518 F.2d 1176, 1177 (4th Cir. 1975) (per curiam) (rejected voucher rule as "archaic, irrational and potentially destructive of the truth-gathering process"); United States v. Bryant, 461 F.2d 912, 918 (6th Cir. 1972) (court adopted the rule that a party may impeach its own witness, but held that leading questions could only be asked on direct if the witness was a hostile witness); United States v. Freeman, 302 F.2d 347, 351 (2d Cir. 1962) (party allowed to show by other witnesses that the facts were not as his witness had said), *cert. denied,* 375 U.S. 958 (1963).

[123] Ladd, *supra* note 116, at 86.

ment to coerce a witness into testifying as expected.[124] Thus undermined, the rule against impeaching one's own witness is completely rejected by rule 607, which allows impeachment by any party to the proceeding.[125]

Unlike federal practice under rule 607, the voucher rule is very much alive in this state's courts,[126] subject to two judicial exceptions. First, a party is allowed to attack the credibility of his own witness who proves to be hostile[127] and whose testimony surprises its proponent.[128] The trial court has discretion in determining whether both of these elements are present before allowing impeachment of a witness by the offering party.[129] The second exception to the voucher rule occurs when the witness is compulsory;[130] a party may impeach any witness he is required to call, whether for statutory or evidentiary necessity.[131] It should be noted that mere discrepancies in testimony do not constitute an impeachment.[132] Presumably then, mere discrepancies in testimony would not constitute surprise or harm sufficient to allow impeachment. With limited exceptions, therefore, the Mississippi rule is diametrically opposed to that expressed by federal rule 607.

Rule 608. Evidence of Character and Conduct of Witness[133]

The common law's reliance on character[134] as an index of testimo-

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[124] *Id.* at 82.

[125] *Accord,* United States v. Palacios, 556 F.2d 1359, 1362-63 (5th Cir. 1977) (prior inconsistent statements can be used to impeach a witness under rule 607 even if there is no surprise); United States v. Alvarez, 548 F.2d 542, 543 (5th Cir. 1977) (testimony of interrogating agents can be used for impeachment purposes under rule 607); United States v. Morgan, 555 F.2d 238, 241-42 (9th Cir. 1977) (sworn statements before a grand jury are admissible for impeachment purposes under rule 607). For the suggestion that rule 607 may serve merely as a "vehicle to get hearsay before the jury," see 36 La. L. Rev. 99, 110-13 (1975).

[126] Manning v. State, 188 Miss. 393, 398, 195 So. 319, 320 (1940); *see, e.g.,* Bynum v. State, 242 Miss. 862, 869, 137 So. 2d 515, 517 (1962) (party may not introduce witness with the court's consent that neither party will be responsible for the testimony).

[127] Magee v. Magee, 320 So. 2d 779, 783 (Miss. 1975).

[128] Bowe v. State, 185 Miss. 547, 554, 158 So. 557, 558 (1939); Bacot v. Hazlehurst Lumber Co., 23 So. 481, 483 (Miss. 1898).

[129] Faust v. State, 221 Miss. 668, 674, 74 So. 2d 817, 818-19 (1954).

[130] *See, e.g.,* Miss. Code Ann. § 91-7-7 (1972) (requiring presentation of subscribing witness in proof of a will).

[131] Clark v. Lansford, 191 So. 2d 123, 125-26 (Miss. 1966).

[132] Manning v. State, 188 Miss. 393, 398, 195 So. 319, 320 (1940).

[133] Fed. R. Evid. 608 provides:

> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful charac-

nial credibility has been critized as "crude and childish."[135] In view of the danger of unfair prejudice against the witness, many courts have held that for impeachment purposes, character evidence must be probative of truthfulness or untruthfulness.[136] A further safeguard imposed on the admissibility of character evidence is that the witness live or work in the same community as the subject of the testimony[137] and be familiar with the subject's general reputation for truth and veracity.[138] Additionally, the evidence must be temporally relevant.[139] The trial court is given broad discretion in determining what traits of truth and veracity are admissible.[140]

Rule 608(a) codifies existing law to the extent that evidence of a witness' character must relate to the witness' reputation for truth and

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ter is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

See Witnesses ⚿ 333-62.

[134] Character has been defined as "a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness." C. McCORMICK, *supra* note 16, at 462.

[135] 3A J. WIGMORE, *supra* note 49, § 922, at 725 (Chadbourn rev. 1970).

[136] *See, e.g.*, Hodge v. United States, 414 F.2d 1040, 1044 (9th Cir. 1969) (testimony on defendant's veracity admissible once defendant takes the stand); Ramirez v. United States, 294 F.2d 277, 281-82 (9th Cir. 1961) (credibility may be impeached by proof that general reputation for truth and veracity is bad); Creekmore v. Crossno, 259 F.2d 697, 698 (10th Cir. 1958) (same). *See generally* C. McCORMICK, *supra* note 16, § 44, at 91 (the evidence must be directed specifically to the trait of veracity).

Evidential value of character as an impeachment device is based on the belief that a witness' character will adequately predict his testimonial behavior. Lawson, *supra* note 102, at 759-60; *cf.* FED. R. EVID. 404(a) (proof of person's character as substantive evidence of conduct generally is inadmissible as irrelevant).

[137] United States v. Nace, 561 F.2d 763, 771 (9th Cir. 1977); United States v. Martorano, 557 F.2d 1, 9 (1st Cir. 1977).

[138] United States v. Harris, 331 F.2d 185, 187 (4th Cir. 1964).

[139] United States v. Lewis, 482 F.2d 632, 639 (D.C. Cir. 1973).

[140] United States v. Estell, 539 F.2d 697, 700 (10th Cir. 1976); United States v. Lewis, 482 F.2d 632, 639 (D.C. Cir. 1973); Iva Ikuko Toguri D'Aquino v. United States, 192 F.2d 338, 372 (9th Cir. 1951), *cert. denied,* 345 U.S. 935 (1952).

veracity.[141] The only procedural qualifications placed on the admissibility of character evidence for impeachment are that the evidence be in the form of opinion or reputation[142] and that the witness' character be attacked prior to the offer of such evidence.[143]

Evidence of specific instances of conduct to support or attack the credibility of a witness is prohibited,[144] with two exceptions: first, when the specific conduct has been the subject of a criminal conviction;[145] second, when either the principal witness or a witness who testified to the character of the principal witness is cross-examined.[146] The second exception is restricted by the requirement that the evidence be probative of truthfulness or untruthfulness.[147] Rule 608(b) thus follows the

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[141] United States v. Nace, 561 F.2d 763, 771 (9th Cir. 1977); United States v. Truslow, 530 F.2d 257, 265 (4th Cir. 1975).

[142] FED. R. EVID. 608(a); *cf.* United States v. Bambulas, 471 F.2d 501, 504 (7th Cir. 1972) (proper to allow question whether witness would believe defendant if testifying under oath); United States v. Walker, 313 F.2d 236, 240 (6th Cir.) (proper to allow testimony that witness would not believe defendant under oath), *cert. denied*, 374 U.S. 807 (1963). *But cf.* Kane v. United States, 399 F.2d 730, 737 (9th Cir. 1968) (proper to refuse offer of testimony that witness would believe defendant), *cert. denied*, 393 U.S. 1057 (1969); Swafford v. United States, 25 F.2d 581, 584 (8th Cir. 1928) (same).

[143] FED. R. EVID. 608(a); *accord,* Homan v. United States, 279 F.2d 767, 771 (8th Cir.) (until the reputation of a witness for truth and veracity has been put in issue, there is no right to admit supporting character evidence), *cert. denied,* 364 U.S. 866 (1960); Kauz v. United States, 188 F.2d 9, 10 (5th Cir. 1951) (same).

The requirement that the witness' veracity must have been under attack before evidence of the witness' character is admissible follows the common law rule against accrediting an unimpeached witness. United States v. Cylkouski, 556 F.2d 799, 802 (6th Cir. 1977); C. MCCORMICK, *supra* note 16, § 49, at 102-07. Opinion or reputation evidence that the witness is untruthful, as well as evidence of misconduct, criminal conviction or corruption, is considered an attack on the witness' character, whereas evidence of bias or interest is not. FED. R. EVID. 608 (a), Advisory Comm. Note. *See also* C. MCCORMICK, *supra* note 16, § 49, at 104. Contradiction has likewise been held an insufficient attack on the witness' veracity to allow the introduction of character evidence. Homan v. United States, 279 F.2d 767, 772-73 (8th Cir.), *cert. denied*, 364 U.S. 866 (1960); Kauz v. United States, 188 F.2d 9, 10 (5th Cir. 1951).

[144] FED. R. EVID. 608(b).

[145] This method of impeachment is treated in rule 609. See notes 172 through 182 and accompanying text *infra.*

[146] FED. R. EVID. 608(b); *accord,* Tla-Koo-Yel-Lee v. United States, 167 U.S. 274, 277 (1897) (cross-examination of a witness about specific conduct is allowable as bearing on the truth and credibility of a witness); United States v. Oliver, 492 F.2d 943, 947 (8th Cir. 1974) (specific incidents may be inquired into only on cross-examination of a witness testifying as to character for truthfulness); Simon v. United States, 123 F.2d 80, 85 (4th Cir.) (on cross-examination, a defendant may be impeached by specific acts which reflect upon his honesty and integrity), *cert. denied,* 314 U.S. 694 (1941).

[147] FED. R. EVID. 608(b); *accord,* Kitchen v. United States, 221 F.2d 832, 834 (D.C. Cir. 1955), *cert. denied,* 357 U.S. 928 (1957); Couiston v. United States, 51 F.2d 178, 181 (10th Cir. 1931).

general rule that evidence of conduct resulting in mere accusation or arrest[148] or evidence showing other charges,[149] prior criminal acts not resulting in conviction,[150] and homosexuality[151] should be excluded,[152] absent a nexus to the witness' reputation for truth and veracity.[153] The trial court has broad discretion over the scope of cross-examination concerning specific instances of conduct.[154]

Finally, the rule explicitly preserves the privilege against self-incrimination.[155] Although a witness cannot invoke the privilege after partially disclosing incriminating matter,[156] the giving of testimony does not operate as a waiver of his right to refuse to answer questions directed

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[148] United States v. Hodnett, 537 F.2d 828, 829 (5th Cir. 1976); United States v. Blanton, 520 F.2d 907, 910 (6th Cir. 1975); United States v. Lewis, 482 F.2d 632, 640 (D.C. Cir. 1973); United States v. Hykel, 461 F.2d 721, 728 n.10 (3d Cir. 1972).

[149] United States v. Pomponio, 517 F.2d 460, 463 (4th Cir.), *cert. denied,* 423 U.S. 1015 (1975); United States v. Sposato, 446 F.2d 779, 780 (2d Cir. 1971); United States v. Aguillar, 387 F.2d 625, 626 (2d Cir. 1967). *But see* United States v. Littlepage, 435 F.2d 498, 500 (5th Cir. 1970) (evidence of pending charges admissible to show hostility or bias), *cert. denied,* 402 U.S. 915 (1971).

[150] United States v. Park, 525 F.2d 1279, 1284 (5th Cir. 1976); United States v. Norman, 402 F.2d 73, 77 (9th Cir. 1968), *cert. denied,* 397 U.S. 938 (1970); United States v. Qualls, 500 F.2d 1238, 1240 n.2 (8th Cir.), *cert. denied,* 419 U.S. 1051 (1974). *But see* Lewis v. Baker, 526 F.2d 470, 475 n.7 (2d Cir. 1975) (prohibition of evidence of misconduct for which there was no conviction inapplicable to civil cases).

[151] United States v. Alvarado, 519 F.2d 1133, 1135 (5th Cir. 1975); United States v. Wright, 489 F.2d 1181, 1186 (D.C. Cir. 1973), *cert. denied,* 424 U.S. 911 (1976); United States v. Nuccio, 373 F.2d 168, 171 (2d Cir.), *cert. denied,* 387 U.S. 906 (1967); Salgado v. United States, 278 F.2d 830, 831 (1st Cir. 1960).

[152] Evidence of specific acts to show basis for bias or prejudice, however, is admissible. *E.g.,* Johnson v. Brewer, 521 F.2d 556, 562 n.13 (8th Cir. 1975); United States v. Baker, 494 F.2d 1262, 1266 (6th Cir. 1974); United States v. Musgrave, 483 F.2d 327, 338 (5th Cir.), *cert. denied,* 414 U.S. 1023 (1973).

[153] Such nexus may be present where the cross-examiner questions a witness about making prior false statements. *See* Lewis v. Baker, 526 F.2d 470, 475 (2d Cir. 1975) (extrinsic evidence that witness lied on previous occasion inadmissible, but questions on cross-examination to same effect allowed).

[154] *E.g., id.* at 475; United States v. Rispo, 470 F.2d 1099, 1102 (3d Cir. 1973) (cross-examination on events reflecting on reputation). McCormick lists five factors bearing on the exercise of the court's discretion: (1) importance of the testimony; (2) relevancy of the act to truthfulness; (3) nearness or remoteness of the misconduct to time of trial; (4) judicial expediency; and (5) whether the witness will be unduly humiliated or prejudiced by the cross-examiner's inquiry. C. MCCORMICK, *supra* note 16, § 42, at 83.

[155] FED. R. EVID. 608.

[156] *See, e.g.,* United States v. Demchak, 545 F.2d 1029, 1031 (5th Cir. 1977) (court may restrict cross-examination to matters to which witness waived privilege on direct); United States v. Cain, 544 F.2d 1113, 1117 (1st Cir. 1976) (waiver applies to instant proceedings only); *In re* Master Key Litigation, 507 F.2d 292, 294 (9th Cir. 1974) (although cross-examination may go to details of incriminating matters broached on direct, inquiry may be limited to prevent "further crimination").

solely to his credibility.[157]

Mississippi allows impeachment by character evidence in much the same manner as rule 608,[158] to question the reputation for truth and veracity[159] of a material witness.[160] Evidence of a witness' or defendant's truth and veracity is based on his general reputation[161] in a community or group in which he is reasonably well-known.[162] The witness giving testimony of reputation must also have known the subject for an "appreciable" period of time,[163] even though that period may have been in the past.[164] One's bad character may not be inferred from a failure to hear anything derogatory about the subject, although good character may be so inferred.[165]

Procedurally, the witness offering testimony of another's reputation must be asked if he knows the general reputation.[166] If not, no further questions may be asked.[167] Familiarity with the other's reputation then permits the witness to qualify the information by explaining its sources

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[157] FED. R. EVID. 608, Advisory Comm. Notes.

[158] As with rule 608, evidence of a good reputation for truth, or "bolstering," is not allowed unless the witness' character has been impeached. McEwen v. State, 132 Miss. 338, 344, 96 So. 690, 691 (1923); Brewer v. Mullins, 97 Miss. 353, 354, 52 So. 257, 257 (1910).

[159] Impeachment by evidence of a general reputation of character for anything besides truth and veracity is not allowed. Newman v. Macklin, 21 Miss. (13 S. & M.) 383, 387-88 (1850).

[160] *See, e.g.*, French v. Sale, 63 Miss. 386, 392-93 (1885) (party-witness); Pickens v. State, 61 Miss. 563, 566-67 (1884) (defendant-witness); Newman v. Mackin, 21 Miss. (13 S. & M.) 383, 387-88 (1850) (witness).

[161] "General reputation consists in what is generally thought of one by those among whom he resides and with whom he is chiefly conversant." Pickens v. State, 61 Miss. 563, 566 (1884).

[162] Community extends to "any community or society in which [the subject] has a well-known or established reputation." Barnes v. State, 249 So. 2d 383, 385 (Miss. 1971). "[P]roof may be made not only of the reputation of the witness where he lives, but also of his repute, as long as it is 'general' and established, in any substantial community of people among whom he is well known . . . ." C. MCCORMICK, *supra* note 16, § 44, at 92-93; *accord,* Barnes v. State, 249 So. 2d 383, 385 (Miss. 1971). Reputation need not be based on what a majority of people think, French v. Sale, 63 Miss. 386, 394 (1885); Pickens v. State, 61 Miss. 563, 567 (1884), as long as a reasonably sufficient number hold the opinion, 63 Miss. at 394.

[163] Williams v. State, 119 Miss. 559, 563, 81 So. 238, 238 (1919).

[164] Mississippi Power & Light Co. v. Tripp, 183 Miss. 225, 233-36, 183 So. 514, 516-17 (1938).

[165] Williams v. State, 119 Miss. 559, 563, 81 So. 238, 238 (1919); French v. Sale, 63 Miss. 386, 393 (1885).

[166] French v. Sale, 63 Miss. 386, 393 (1885); Pickens v. State, 61 Miss. 563, 566 (1884); *accord,* C. MCCORMICK, *supra* note 16, § 44, at 90 (illustrating an example of a proper question).

[167] Pickens v. State, 61 Miss. 563, 566 (1884).

and extent[168] and finally to explain the subject's general reputation. Upon request he may also testify as to "whether from such general reputation he would believe the person under oath."[169] Where the witness himself is being impeached on cross-examination, the scope of the examination is not unlimited. Embarrassing and harassing questions must be avoided.[170] In contrast to the federal rule, Mississippi does not allow impeachment by specific acts of conduct which have not resulted in a conviction.[171]

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTIONS OF CRIME[172]

Although extrinsic proof of specific instances of conduct is generally

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[168] French v. Sale, 63 Miss. 386, 393 (1885); Pickens v. State, 61 Miss. 563, 566 (1884).

[169] French v. Sale, 63 Miss. 386, 393 (1885).

[170] *See, e.g.*, Hankins v. State, 288 So. 2d 866, 868 (Miss. 1974) (attempted impeachment of prosecution's witness).

[171] *See, e.g.*, Allison v. State, 274 So. 2d 678, 682-83 (Miss. 1973) (error to impeach accused's reputation for peace and violence by unindicted acts of misconduct); *cf.* MISS. CODE ANN. § 13-1-13 (1972) (allowing examination regarding final convictions).

[172] FED. R. EVID. 609 provides:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which is punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if convic-

inadmissible to attack the credibility of a witness,[173] evidence that a witness has been finally convicted of certain crimes may be used. Prior to enactment of the federal rules, impeachment was allowed where a witness had been convicted of any crime involving moral turpitude.[174] Under the new federal rule, convictions of any felony[175] or a misdemeanor involving dishonesty[176] are admissible except for juvenile adjudications.[177] Impeachment evidence is limited to the credibility of the subject witness,[178] whether the witness be a disinterested party or, as is most often the case, the criminal defendant testifying at his own prosecution. Since a conviction is frequently at stake, the judge must and does have wide discretion[179] in determining whether the evidence is prejudicial to the defendant's case and is therefore inadmissible.[180] Im-

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tion of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

See Witnesses ⚿ 337, 347, 359.

[173] See notes 144 through 154 and accompanying text *supra*.

[174] 2 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 416, at 188-89 (1969); *accord*, United States v. Gloria, 494 F.2d 477, 481 (5th Cir.) (evidence of misdemeanor of assisting aliens into country inadmissible for impeachment since it does not involve moral turpitude), *cert. denied*, 419 U.S. 994 (1974).

[175] Use of the term felony is avoided in the rule because of its varying interpretations. Rather, the rule speaks in terms of the sentence, *i.e.* death or imprisonment for over one year "under the law under which he was convicted," FED. R. EVID. 609, in order to effectuate the statement that "[p]rovable convictions are not limited to violations of federal law," *id.*, Advisory Comm. Notes.

[176] The term of art associated with crimes involving "dishonesty or false statements" is *crimen falsi*, which one court has explained as encompassing "perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense or any other offense the commission of which involves some element of deceitfulness, untruthfulness or falsification bearing on the accused's propensity to testify truthfully." Government of the Virgin Islands v. Toto, 529 F.2d 278, 281 (3d Cir. 1976).

[177] The distinction is drawn between adjudications of delinquency, the purpose of which is to avoid the stigma of a criminal conviction, Cotton v. United States, 355 F.2d 480, 481 (10th Cir. 1966), and a criminal conviction. United States v. Canniff, 521 F.2d 565, 569 & n.2 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976).

[178] *E.g.*, United States v. Henry, 528 F.2d 661, 666-68 (D.C. Cir. 1976); United States v. Harris, 331 F.2d 185, 188 (4th Cir. 1964).

[179] *See, e.g.*, United States v. Hayes, 553 F.2d 824, 827-28 (2d Cir. 1977) (no abuse of discretion even though conviction was only arguably probative of credibility); United States v. Mahone, 537 F.2d 922, 928-29 (7th Cir. 1976) (without a more explicit record, trial judge could not be deemed to have abused discretion).

[180] FED. R. EVID. 609(a), (b). Factors to be considered in the determination of impeachment or prejudice: "1) The impeachment value of the prior crime; 2) The point in time of the conviction and the witness' subsequent history; 3) The similarity between the past crime and the charged crime; 4) The importance of the defendant's testimony; 5) The

peachment by cross-examination of a witness is limited to establishing any convictions.[181] The witness may then offer explanations or circumstances on redirect.[182]

The Mississippi rule on impeachment by evidence of conviction of crime differs slightly from rule 609. Section 13-1-13 of the Mississippi Code[183] provides that a conviction for any offense, regardless of the nature or the punishment prescribed, is admissible to impeach the credibility of a witness.[184] However, under section 63-9-15,[185] conviction of a traffic violation less than a felony "shall not affect or impair the credibility of such person as a witness in any civil or criminal proceeding." In *Jones v. State,*[186] the Mississippi Supreme Court encountered the apparent inconsistency in these two statutory provisions. The court reversed a conviction for driving under the influence of intoxicating liquor because the trial court had allowed the defendant to be cross-examined about his prior conviction of misdemeanor traffic offenses as an attack on his credibility.[187] The court stated, "[I]t is not logical that convictions for minor misdemeanor traffic offenses have any bearing upon the credibility or veracity of a witness."[188] Since there are many other minor offenses of the same caliber as traffic convictions, one can only speculate whether the court will find it necessary to make further exceptions to this rule.

Section 13-1-13 allows impeachment by evidence of convictions. Nothing less will suffice.[189] The strict requirement that a final conviction

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centrality of the credibility issue." United States v. Mahone, 537 F.2d 922, 929 (7th Cir. 1976) (citing 3 WEINSTEIN'S EVIDENCE ¶ 609[03], at 609-62 to -75 (1975)). In United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975), the court was faced with a rule 609 motion to suppress a state conviction. It granted the motion conditioned on defendant's agreement to refrain from either making himself out as "pristine" in the eyes of the law or attempting to impeach a government witness by his prior conviction. *Id.* at 928-29.

[181] *E.g.*, United States v. Perry, 512 F.2d 805, 806-07 (6th Cir. 1975); United States v. Dow, 457 F.2d 246, 250 (7th Cir. 1972); *cf.* United States v. Miller, 478 F.2d 768, 769-70 (4th Cir. 1973) (facts of conviction extend to time and place of the conviction, nature of the crime, and punishment).

[182] United States v. Treslow, 530 F.2d 257, 265 (4th Cir. 1975).

[183] MISS. CODE ANN. § 13-1-13 (1972).

[184] *Id.; accord, e.g.*, Wells v. State, 288 So. 2d 860, 863-64 (Miss. 1974); Nicholson v. State, 254 So. 2d 881, 883-84 (Miss. 1971). Conviction of perjury or subornation of perjury permanently renders a person incompetent to testify as a witness. MISS. CODE ANN. § 13-1-11 (1972). See note 23 and accompanying text *supra.*

[185] MISS. CODE ANN. § 63-9-15 (1972).

[186] 268 So. 2d 348 (Miss. 1972).

[187] *Id.* at 350.

[188] *Id.* The court also noted that since the traffic violation statute was enacted subsequent to the general statute on credibility, the subsequent statute prevails. *Id.* at 349.

[189] *See, e.g.*, Haralson v. State, 314 So. 2d 722, 723 (Miss. 1975) (pending charges); McDonald v. State, 285 So. 2d 177, 179-80 (Miss. 1973) (accusations); Allison v. State,

be shown avoids unnecessarily prejudicing a jury against a witness, especially a criminal defendant.[190] Even evidence of a conviction resulting from a nolo contendere plea is inadmissible,[191] as are all details beyond the conviction, the nature of the crime, and the date of the judgment.[192] In contrast to the federal rule, even the impeached witness is not allowed to present details or explanations.[193] Procedurally, the witness must be asked if he has ever been convicted of a crime, and only if the witness denies his conviction can evidence of the conviction be admitted.[194]

Mississippi law seems to conform to rule 609(d) in prohibiting the admission of evidence of juvenile convictions for impeachment purposes.[195] The Mississippi Supreme Court held in *Hamburg v. State*,[196] however, that the right of a defendant to cross-examine his accuser overrides the right of any witness who is testifying against the defendant to keep secret his juvenile convictions.[197]

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274 So. 2d 678, 682 (Miss. 1973) (record failed to specify any conviction; witness admitted acts but not convictions); Mars v. Hendon, 178 Miss. 157, 171, 171 So. 880, 883 (1937) (indictment); *cf.* Bridges v. State, 336 So. 2d 1309, 1310 (Miss. 1976) (plea of guilty tantamount to conviction); Nicholson v. State, 254 So. 2d 881, 883-84 (Miss. 1971) (impeachment by conviction allowed during appeal and until reversal); Statham v. Blaine, 234 Miss. 649, 668, 107 So. 2d 93, 100 (1958) (impeachment by conviction allowed even after pardon).

[190] "[T]he question of guilt or innocence of the crime charged should be received by the jury unhampered by any suggestion or insinuation of any former crime or misconduct that would prejudice jurors. Of course, under proper circumstances, prior *convictions* for certain criminal offenses may be shown to impeach the credibility of a witness or defendant." McDonald v. State, 285 So. 2d 177, 180 (Miss. 1973); *accord,* Allison v. State, 274 So. 2d 678, 682 (Miss. 1973).

[191] Keyes v. State, 312 So. 2d 7, 9-10 (Miss. 1975).

[192] Simmons v. State, 241 Miss. 481, 492-93, 130 So. 2d, 860, 865 (1961); Peacock v. State, 174 So. 582, 582 (1937); *see* Murray v. State, 266 So. 2d 139, 141-42 (Miss. 1972) (punishment imposed for conviction held inadmissible).

[193] Smith v. State, 102 Miss. 330, 337, 59 So. 96, 96 (1912); *cf.* Buckley v. State, 223 So. 2d 524, 528 (Miss. 1969) (leading questions on direct in an attempt to bolster witness who had admitted convictions held improper).

[194] Wells v. State, 288 So. 2d 860, 864 (Miss. 1974); Matthews v. State, 139 So. 2d 386, 389 (1962); Cook v. State, 85 Miss. 738, 747, 38 So. 110, 112 (1905); *cf.* Johns v. State, 255 So. 2d 322, 324 (Miss. 1971) (error to question convictions without being able to prove them after denial).

[195] *See* MISS. CODE ANN. § 43-23-17 (1972) ("No adjudication upon the status of any child shall operate to impose any of the civil disabilities ordinarily imposed by conviction of adults, nor shall [it] be admissible against the child in any case or proceeding in any other court . . . ."); *accord, id.* § 43-21-19.

[196] 248 So. 2d 430 (Miss. 1971).

[197] *Id.* at 434. Note that this holding likewise comports with rule 609(d), which allows the court to admit evidence of juvenile adjudication where it determines admission is necessary for a fair determination of guilt or innocence.

RULE 610. RELIGIOUS BELIEFS OR OPINIONS[198]

While a federal witness may not be impeached by an attack on his truthfulness because of his religious beliefs, there is no restriction against questioning on such matters. Thus, an adversary may cross-examine a witness about religious beliefs in an attempt to prove interest or bias.[199] Section 13-1-15 of the Mississippi Code[200] provides that a witness will not be considered incompetent because of the nature of his religious beliefs. This apparently does not go quite as far as the federal rule, and indeed, *Gambrell v. State*[201] held that religious beliefs of a deceased were admissible to bear on the weight given a dying declaration by the jury.[202] Questions regarding a witness' interest in a case are statutorily admissible,[203] which concept comports with that expressed in the Advisory Committee's note to rule 610.[204]

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION[205]

Rule 611 does not change a federal judge's power to control the presentation of evidence;[206] it merely codifies existing law.[207] The trial

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[198] FED. R. EVID. 610 provides: "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced." *Cf.* notes 38 through 45 and accompanying text *supra* (oaths and affirmations). See Witnesses ⚿ 340(2).

[199] FED. R. EVID. 610, Advisory Comm. Notes.

[200] MISS. CODE ANN. § 13-1-15 (1972).

[201] 92 Miss. 728, 46 So. 138 (1908).

[202] *Id.* at 736, 46 So. at 138.

[203] MISS. CODE ANN. § 13-1-13 (1972).

[204] See note 199 and accompanying text *supra.*

[205] FED. R. EVID. 611 provides:

> (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> (b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
>
> (c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

See Witnesses ⚿ 221-94.

[206] Fenner, *Competency and Examination of Witnesses Under Article VI of the Federal Rules of Evidence and the Nebraska Evidence Rules,* 9 CREIGHTON L. REV. 559, 580 (1976).

[207] *See* 3 WEINSTEIN'S EVIDENCE ¶ 611[01], at 611-14 (1976).

judge has broad discretion over such matters,[208] subject only to the stated objectives concerning truth, time, and harassment.[209]

One of the most controversial aspects of the federal rules[210] limits the scope of cross-examination to the subject matter of direct examination and matters affecting credibility.[211] This position embraces the majority or American rule which had prevailed in federal courts prior to the adoption of the rules of evidence.[212] In adopting this position, Congress rejected the Supreme Court's proposal based on the English or wide-open rule,[213] which would have permitted cross-examination on matters relevant to any issue in the case.[214] The rule also accepts another existing federal court practice which grants the trial judge discretion to permit cross-examination on additional matters as if on direct examination.[215]

The traditional method of dealing with leading questions is embodied in rule 611(c).[216] Leading questions[217] are not to be used on direct examination except where necessary to develop the witness' testimony[218] or where the witness is hostile[219] or adverse.[220] Leading questions are

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[208] FED. R. EVID. 611(a). For reaffirmance of the position taken by subdivision (a), see Geders v. United States, 425 U.S. 80, 86-87 (1976).

[209] FED. R. EVID. 611, Advisory Comm. Notes. *See also* FED. R. EVID. 102 & 403.

[210] *See Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary,* Serial No. 2, 93d Cong., 1st Sess. 526-27 (1973) [hereinafter referred to as *1973 Hearings*].

[211] FED. R. EVID. 611(b).

[212] H. R. REP. No. 650, *supra* note 3, at 12 (1973); United States v. Johnson, 285 F.2d 35, 40 (9th Cir. 1960); Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 F. 668, 674-75 (8th Cir. 1904).

[213] *See* Order, 56 F.R.D. 184 (1972) (proposed rule 611(b)).

[214] *See* 6 J. WIGMORE, *supra* note 49, § 1885, at 698-99 (1976).

[215] *E.g.*, Coil v. United States, 343 F.2d 573, 578-79 (8th Cir.), *cert. denied*, 382 U.S. 821 (1965); United States v. Taylor, 312 F.2d 159, 160 (7th Cir. 1963); Urling v. Fink, 141 F.2d 58, 59-60 (3d Cir. 1944).

[216] 3 WEINSTEIN'S EVIDENCE ¶ 611[05], at 611-54 (1976). See FED. R. CIV. P. 43(b) (1972) (superseded by rule 611).

[217] The essential test of a leading question is whether it so suggests to the witness the specific tenor of the reply desired by counsel that such a reply is likely to be given irrespective of an actual memory. The evil to be avoided is that of supplying a false memory for the witness.

United States v. Durham, 319 F.2d 590, 592 (4th Cir. 1963).

[218] *See, e.g.*, United States v. Littlewind, 551 F.2d 244, 245 (8th Cir. 1977) (leading questions allowed to elicit reluctant young girls' testimony about rapes); United States v. Librach, 520 F.2d 550, 555-56 (8th Cir. 1975) (government allowed to lead its own evasive witness); Rotolo v. United States, 404 F.2d 316, 317 (5th Cir. 1968) (leading permitted where minor witness was upset, nervous, and reluctant to testify).

[219] *E.g.*, United States v. Sutherland, 463 F.2d 641, 650 (5th Cir. 1972).

[220] The rule equates an adverse party to "a witness identified with an adverse party," intending that the category be liberally construed in favor of the interrogator. FED. R. EVID. 611(c), Advisory Comm. Note.

allowed on cross-examination.[221]

Like rule 611(a), Mississippi allows the trial judge wide discretion to control the method and order of interrogation and presentation of evidence.[222] In contrast, Mississippi follows the English rule regarding cross-examination. A party in state court may cross-examine a witness on any matter relevant to the case regardless of whether the issue was raised on direct examination[223] and even though the inquiry involves collateral issues only remotely related to the litigation.[224] The scope of cross-examination still does not encompass inquiry directed solely to embarrass or humiliate the witness.[225] Mississippi allows leading questions on cross-examination[226] but not on direct examination, except for exploration of preliminary matters,[227] and confrontation of adverse parties[228] or hostile witnesses.[229]

RULE 612. WRITING USED TO REFRESH MEMORY[230]

The practice has long been established that a witness may use a

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[221] *E.g.*, Ewing v. United States, 135 F.2d 633, 639 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 776 (1943).

[222] *See, e.g.*, Jackson Yellow Cab. Co. v. Alexandra, 246 Miss. 268, 278, 148 So. 2d 674, 678-79 (1963) (it is the judge's duty to see that the trial is conducted in an orderly manner); Ross v. Biggs, 206 Miss. 542, 558, 40 So. 2d 293, 297 (1949) (judge's discretion in directing the trial is seldom overruled on appeal).

[223] Dozier v. State, 257 So. 2d 857, 859 (Miss. 1972); Tippet v. Hunter, 205 So. 2d 267, 273 (Miss. 1967).

[224] Prewitt v. State, 156 Miss. 731, 735, 126 So. 824, 825 (1930). The *Prewitt* court stated:

> In this state, cross-examination is allowed coextensive with the issue; . . . but it may proceed into the collateral circumstances surrounding, or in any way affecting, the transaction to the full extent that they have relevant connection by way of testing the memory, accuracy, sincerity, interest, or bias of the witness. [T]he privilege should not be interfered with or hampered or restricted by the trial judge, except in clear case of irrelevancy, trespass beyond admissible ground, or extremes of continual, aimless repetition.

Id. (citation omitted).

[225] Hankins v. State, 288 So. 2d 866 (Miss. 1974); Craft v. State, 271 So. 2d 735 (Miss. 1973).

[226] Boles v. State, 24 Miss. (2 Cush.) 445, 455-56 (1852).

[227] Stringfellow v. State, 26 Miss. (4 Cush.) 157, 160 (1853) ("[I]f the question propounded relate merely to introductory matter, it should not be objected to, although in form it be leading.").

[228] *See* MISS. CODE ANN. § 13-1-53 (1972) (adversary may be called to testify); Dixon v. Curtis, 340 So. 2d 722, 725-26 (Miss. 1977) (adverse witness may be cross-examined if called); *cf.* Wagley v. Colonial Baking Co., 208 Miss. 815, 854, 45 So. 2d 717, 724 (1950) (where adversary is a corporation, its "president, manager or heads of department [which] may speak for the corporation" are also adversaries).

[229] Hooks v. State, 197 So. 2d 238, 239-40 (Miss. 1967) (foundation requirements include hostility and surprise).

[230] FED. R. EVID. 612 provides:

writing to refresh his recollection while testifying.[231] Various forms of writings have been used to refresh a witness' memory,[232] including those not made by the witness[233] and those that are inadmissible as evi-

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Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

See Witnesses ⚿ 254-57.

[231] C. McCormick, *supra* note 16, § 9, at 15; United States v. Morlang, 531 F.2d 183, 191 (4th Cir. 1975) (witness may refresh his recollection by reference to writing providing he testifies from memory, not from writing); United States v. Schwartzbaum, 527 F.2d 249, 253 (2d Cir. 1975) (any writing may be used to refresh recollection even though writing was not made by the witness), *cert. denied,* 424 U.S. 942 (1976); Thomas v. United States, 227 F.2d 667, 671 (9th Cir.) (within court's discretion to allow prosecutor's suggestion of circumstances which refresh the witness' memory), *cert. denied,* 350 U.S. 911 (1955); McWilliams v. Lewis, 125 F.2d 200, 200-01 (D.C. Cir. 1941) (officer allowed to refer to six-year-old accident report); United States v. Graham, 102 F.2d 436, 441 (2d Cir.) (within court's discretion to allow refreshing of memory), *cert. denied,* 307 U.S. 643 (1939). Prerequisites for the use of a writing to refresh recollection are a demonstrated need to refresh the witness' memory and proof that the writing in fact does refresh the witness' recollection. Thompson v. United States, 342 F.2d 137, 140 (5th Cir.), *cert. denied,* 381 U.S. 926 (1965); Tracy v. Goldberg, 289 F.2d 467, 470 (3d Cir.), *cert. denied,* 368 U.S. 828 (1961).

[232] *See, e.g.,* United States v. Jenkins, 442 F.2d 429, 438-39 (5th Cir. 1971) (prior statement); United States v. Panepinto, 430 F.2d 613, 617 (3d Cir.) (memo concerning defendant's confession), *cert. denied,* 400 U.S. 949 (1970); United States v. Baker, 424 F.2d 968, 970 (4th Cir. 1970) (investigation notes); Williams v. United States, 365 F.2d 21, 22 (7th Cir.) (memo prepared from recorded phone conversation), *cert. denied,* 385 U.S. 981 (1966); United States v. Rosen, 353 F.2d 523, 524 (2d Cir.) (grand jury minutes), *cert. denied,* 383 U.S. 908 (1966); Robertson v. United States, 249 F.2d 737, 742 (5th Cir. 1957) (former testimony), *cert. denied,* 356 U.S. 919 (1958); Gencarella v. Fyfe, 171 F.2d 419, 421 (1st Cir. 1948) (accident report). *But see* Goings v. United States, 377 F.2d 753, 760 (8th Cir. 1967) (writing not allowed to be used as subterfuge for suggestion); NLRB v. Federal Dairy Co., 297 F.2d 487, 488-89 (1st Cir. 1961) (specifically prepared extensive testimonial notes not allowed to refresh witness' memory).

[233] United States v. Schwartzbaum, 527 F.2d 249, 253 (2d Cir. 1975), *cert. denied,* 424 U.S. 942 (1976).

dence.[234] To ensure that the witness is in fact testifying to a "present recollection revived,"[235] courts have traditionally required that the adverse party be allowed to examine the writing.[236] Earlier decisions, however, held that the opponent's right to examine the writing did not extend to writings used prior to the witness' taking the stand.[237] Rule 612 maintains the status quo. The adverse party has an absolute right to examine a writing used while the witness is testifying, whereas the court may in its discretion allow the adverse party to examine a writing used prior to testifying.[238] The adverse party may cross-examine the witness concerning the writing and introduce relevant parts of the writing into evidence[239] so long as the writing was used to refresh the witness' memory "for the purpose of testifying."[240]

Rule 612 is subject to the *Jencks* statute,[241] which requires the court, on motion of the defendant, to order the government to produce any written statement or report of a witness after direct examination in a criminal prosecution brought by the United States.[242] Both the *Jencks*

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[234] *E.g.*, United States v. Jenkins, 442 F.2d 429, 438 (5th Cir. 1971); Esperti v. United States, 406 F.2d 148, 150 (5th Cir.), *cert. denied*, 394 U.S. 1000 (1969); United States v. Baratta, 397 F.2d 215, 222 (2d Cir.), *cert. denied*, 393 U.S. 939 (1968). *Contra*, Inge v. United States, 356 F.2d 345, 350 (D.C. Cir. 1966).

[235] *See* United States v. Riccardi, 174 F.2d 883, 886, 889-90 (3d Cir.) (distinguishing between "present recollection revived" and "past recollection recorded"), *cert. denied*, 337 U.S. 941 (1949).

[236] *E.g.*, Marcus v. United States, 422 F.2d 752, 754 (5th Cir. 1970) (absolute right); National Dairy Prod. Corp. v. United States, 384 F.2d 457, 460 (8th Cir.) (within court's discretion), *cert. denied*, 390 U.S. 957 (1967); La Chemiste Lacoste v. Alligator Co., 60 F.R.D. 164, 168-69 (D. Del. 1973) (absolute right). *But see* United States v. Socony Vacuum Oil Co., 310 U.S. 150, 236-37 (1940) (no iron-clad rule requires that opponent be allowed to examine the writing).

[237] *E.g.*, McGill v. United States, 270 F.2d 329, 330-31 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 905 (1960).

[238] Goldman v. United States, 316 U.S. 129, 132 (1940) (discretionary with trial court in the interests of justice); *accord*, Needelman v. United States, 261 F.2d 802, 806 (5th Cir. 1958); Kaufman v. United States, 163 F.2d 404, 409 (6th Cir. 1947), *cert. denied*, 333 U.S. 857 (1948).

[239] United States v. Smith, 521 F.2d 957, 969 (D.C. Cir. 1975) (although ordinarily inadmissible, writing used to refresh memory is admissible when offered by opposing party or pursuant to jury's request); Markel Serv., Inc. v. National Farm Lines, 426 F.2d 1123, 1128 (10th Cir. 1970) (deposition used to refresh recollection can be treated as evidence by opponent). If disclosure is not requested, rule 612 options are waived. 3 WEINSTEIN'S EVIDENCE ¶ 612[05], at 612-35 (1976).

[240] The requirement that the writing must have been used to prepare for testifying is designed to prevent use of the rule as a pretext for a fishing expedition into the opponent's files. FED. R. EVID. 612, Advisory Comm. Notes.

[241] FED. R. EVID. 612; *see* 18 U.S.C. § 3500 (1970). *See generally* Clayton, *A Commentary on the Jencks Case and Its Progeny*, 31 MISS. L.J. 1 (1959) (discussing the rule that prosecution must show writing to defense after prosecution finishes direct examination).

[242] 18 U.S.C. § 3500 (1970). The scope of rule 612 differs significantly from the *Jencks*

statute and rule 612 require the judge, upon objection, to inspect the writing in camera and excise portions irrelevant to the witness' testimony.[243] Sanctions for noncompliance with a rule 612 order to produce a writing are left to the court's discretion in civil cases.[244] In criminal cases rule 612 parallels the *Jencks* statute, requiring the testimony to be stricken or a mistrial declared.[245]

Mississippi's position on writings used to refresh a witness' memory differs somewhat from federal practice. Prerequisites for using a writing to refresh a witness' memory in state courts, as in federal courts,[246] are that the witness have no present recollection of the facts and that the writing serve to refresh his memory.[247] But Mississippi imposes two additional requirements not applicable in federal courts:[248] the writing must have been made by the witness using it[249] and the witness must be able to swear to the accuracy of the facts recorded therein.[250] The writing must also have been made contemporaneously with the events that were recorded.[251]

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statute. The criminal procedure statute applies only to statements of government witnesses in criminal cases, whether or not they are used to refresh recollection, while the evidentiary rule applies to all witnesses in all cases, provided that the statement is used for purposes of refreshing the witness' recollection. FED. R. EVID. 612, Advisory Comm. Notes.

[243] *Compare* 18 U.S.C. § 3500(c) (1970) *with* FED. R. EVID. 612.

[244] FED. R. EVID. 612. See FED. R. CIV. P. 37(b).

[245] *Compare* 18 U.S.C. § 3500(d) (1970) *with* FED. R. EVID. 612.

[246] See note 231 *supra*.

[247] Pearson v. State, 176 Miss. 9, 23, 167 So. 644, 648 (1936) (witness can refresh memory from writing after testifying to correctness of writing); Cooper v. State, 59 Miss. 267, 273 (1881) (witness can use writing to refresh memory if he is then able to recall the facts stated in the writing).

[248] See text accompanying note 233 *supra*.

[249] *See, e.g.*, Haise v. Alabama & V. Ry., 78 Miss. 413, 417, 28 So. 941, 942 (1900) (witness allowed to refer to a writing he made on the day of the accident before giving his testimony); Alabama & V. Ry. v. Coleman, 78 Miss. 182, 186, 28 So. 828, 829 (1900) (witness with no personal knowledge of certain facts cannot testify to those facts by referring to a writing made by another); Cooper v. State, 59 Miss. 267, 268 (1881) (witness can refresh his memory on the witness stand by referring to a writing made by him at the time of the accident).

[250] Pearson v. State, 176 Miss. 9, 23, 167 So. 644, 648 (1936) (witness can refer to a writing to refresh his memory if he first testifies to the accuracy of the facts recorded in the writing). *But see* Potts v. McPeters, 140 Miss. 97, 105, 103 So. 202, 202-03 (1925) (no need to show that records were accurately kept where they are used only to refresh the memory of a witness and are not introduced as evidence); Finley v. Armstrong, 117 Miss. 289, 297, 78 So. 177, 178 (1918) (witness can refer to books of account, even though incomplete, if by doing so he is then able to remember and testify about the entries in the book).

[251] Martin v. State, 197 Miss. 96, 105-06, 19 So. 2d 488, 490 (1944) (witness not allowed to refer to writing made more than a year after the occurrence of the facts set forth in the writing). The restrictions of authorship, time, and correctness were developed to ensure

Mississippi follows rule 612 in allowing the adverse party to examine a writing used to refresh a witness' memory while the witness is on the stand.[252] The Mississippi courts apparently have not confronted the inspection issue where the witness referred to the writing to refresh his memory prior to testifying. In view of the similarity of the federal and state rules of discovery,[253] it is expected that the state courts would follow the federal rule by leaving this decision to the sound discretion of the trial judge.

RULE 613. PRIOR STATEMENTS OF WITNESSES[254]

One of the most frequently used methods of attack on a witness' credibility is proof of a prior inconsistent statement.[255] The common law rule followed in most jurisdictions was derived from an old English case known as *The Queen's Case*,[256] which held that before a witness could be questioned concerning a prior statement, he must be allowed to read the statement.[257] The rationale for the holding was to protect the propo-

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the reliability of the writing itself, which the witness swears is a "record of his past recollection," rather than as prerequisites to refreshing memory. C. MCCORMICK, *supra* note 16, § 9, at 15. Most courts adhere to the view that any writing may be used as a stimulus to present memory. *Id.* at 16.

[252] *See, e.g.*, Shell Oil Co. v. Pou, 204 So. 2d 155, 158 (Miss. 1967) (error to deny request by opposing party to examine notes and records used by physician while testifying to refresh his memory); Mississippi State Highway Comm'n v. Howard, 253 Miss. 556, 562-63, 176 So. 2d 294, 296-97 (1965) (error in eminent domain proceeding to deny right to examine real estate agent's notes from which he was testifying).

[253] *See generally* Pyle, Ott & Rumfelt, *Mississippi Rules of Discovery*, 46 MISS. L.J. 681 (1975).

[254] FED. R. EVID. 613 provides:

> (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

See Witnesses ⚿ 379-97.

[255] *See* C. MCCORMICK, *supra* note 16, § 33, at 66 (attack probably most frequent and most successful of all). *See generally* United States v. Carr, 21 F.R.D. 7, 8-9 (S.D. Cal. 1957) (under prior federal rules, defendant entitled to view exact reproduction of prior inconsistent statement); *see also* United States v. Partin, 493 F.2d 750, 750 (5th Cir. 1974) (testimony of admitted perjurer must be carefully scrutinized).

[256] 129 Eng. Rep. 976 (K.B. 1820), *cited in* FED. R. EVID. 613(a), Advisory Comm. Note.

[257] 129 Eng. Rep. at 976-77.

nent of the witness from unfair surprise.[258] However, as the Fifth Circuit noted in *Wright Root Beer Co. v. Dr. Pepper Co.*,[259] the rule's effect was an impediment to the inherent function of the adversary system—to test the truth of the evidence.[260]

Rule 613 follows the modern trend of the federal courts[261] by eliminating the requirement that the witness be allowed to read his prior statement before questioning.[262] The witness is protected from the possibility of unfair insinuations by the proviso that the statement be disclosed to opposing counsel on request.[263] Rule 613 also relaxes the traditional insistence that, before proof of a prior statement can be admitted, a foundation must be laid during cross-examination specifying the time and sequence of the prior statement.[264]

Mississippi follows the general rule that the credibility of a witness may be attacked by proof that the witness has previously made extrajudicial statements which are inconsistent with the witness' testimony.[265] The statement must, however, be material and relevant to the case.[266] An opposing party can show that a witness has made prior inconsistent statements concerning material facts either by eliciting the witness' own admission on cross-examination or by producing other witnesses to describe the statements.[267] Such evidence of prior inconsistent statements is admissible only for impeachment purposes and not as substantive evidence of the facts contained in the statement.[268] Although a prior statement can be used for impeachment purposes without being intro-

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[258] 3 WEINSTEIN'S EVIDENCE ¶ 613[02], at 613-8 (1976).

[259] 414 F.2d 887 (5th Cir. 1969).

[260] *Id.* at 891. *But see* United States v. Bernstein, 417 F.2d 641, 644 (2d Cir. 1969) (refusal to allow view of statement cured by allowing counsel to read statement during summation).

[261] *See, e.g.*, United States v. Hibler, 463 F.2d 455, 462 (9th Cir. 1972) (witness' memory must be refreshed by inquiries so as to permit explanation of inconsistency); Wright Root Beer Co. v. Dr. Pepper Co., 414 F.2d 887, 891 (5th Cir. 1969) (same); United States v. Dillard, 101 F.2d 829, 837 (2d Cir. 1938) (witness to be told only when and where statement was made), *cert. denied*, 306 U.S. 635 (1939).

[262] FED. R. EVID. 613.

[263] *Id.*

[264] *1973 Hearings*, *supra* note 210, at 74-75 (statement of Edward W. Cleary).

[265] Hall v. State, 250 Miss. 253, 264, 165 So. 2d 345, 350 (1964); Southern Beverage Co. v. Barbarin, 219 Miss. 493, 504-06, 69 So. 2d 395, 397-98 (1954); Shaw v. State, 136 Miss. 1, 4-5, 100 So. 519, 519-20 (1924); Williams v. State, 73 Miss. 820, 824-30, 19 So. 826, 827-29 (1896).

[266] Kehoe v. State, 194 Miss. 339, 342-43, 12 So. 2d 149, 150-51 (1943); Jeffries v. State, 77 Miss. 757, 761, 28 So. 948, 948 (1900).

[267] Hall v. State, 250 Miss. 253, 264, 165 So. 2d 345, 350 (1964).

[268] Magee v. Magee, 320 So. 2d 779, 783 (Miss. 1975); Sims v. State, 313 So. 2d 388, 391 (Miss. 1975); Boyd v. Donald, 250 Miss. 618, 623-24, 167 So. 2d 661, 663 (1964).

duced into evidence,[269] extrinsic evidence must be authenticated before it is admissible.[270]

The extent to which Mississippi follows federal rule 613 by not requiring the questioner to show prior statements to a witness before questioning him is uncertain. In *Illinois Central Railroad v. Aldy*,[271] the trial judge required the questioner to read the alleged prior inconsistent statement to the witness before cross-examining him concerning the statement.[272] The Mississippi Supreme Court ruled that this was within the discretion of the trial judge and that no error was committed.[273] Although seemingly contrary to rule 613,[274] several factors mitigate the inference that the Mississippi Supreme Court intended to follow the rule of *The Queen's Case*.[275] The witness had admitted signing the statement, although he was unable to read it at the time and was unsure of its contents. The statement was read to the witness outside the presence of the jury, and the appellant was allowed to cross-examine the witness fully.[276] The fact that the court based its ruling on the broad discretionary power of the judge to see that a case is "fairly and impartially conducted,"[277] rather than authority concerning impeachment, seems to indicate that the court did not intend to announce a conclusive rule of law concerning impeachment by prior statements.

RULE 614. CALLING AND INTERROGATION OF WITNESS BY COURT[278]

Rule 614 codifies the rule, well-established in federal courts, that a

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[269] Anderson v. Sills, 242 Miss. 238, 244-45, 134 So. 2d 482, 484 (1961).

[270] *See* Hall v. State, 250 Miss. 253, 264, 165 So. 2d 345, 350 (1964) (if witness admits statements, no additional proof is required); *cf.* Anderson v. Sills, 242 Miss. 238, 244-45, 134 So. 2d 482, 484 (1961) (signed statement could be used for impeachment after witness verified that signature looked like his own).

[271] 185 So. 2d 680 (Miss. 1966).

[272] *Id.* at 682.

[273] *Id.* at 682-83.

[274] FED. R. EVID. 613.

[275] 129 Eng. Rep. 976 (K.B. 1820).

[276] Illinois Cent. R.R. v. Aldy, 185 So. 2d 680, 682 (Miss. 1966).

[277] *Id.* at 682-83.

[278] FED. R. EVID. 614 provides:

> (a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
>
> (b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.
>
> (c) Objections. Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

See Criminal Law ⚷ 656(2); Witnesses ⚷ 246.

trial judge has the inherent authority to call[279] and interrogate[280] witnesses. Although one reason for allowing the judge to call witnesses—the rule against impeaching one's own witness[281]—is abolished by rule 607,[282] other equally compelling reasons remain. One such reason is to aid the quest for justice where neither party will risk calling a material witness.[283] Thus, even though the primary responsibility for finding, selecting, and presenting the evidence lies with the parties and counsel,[284] the judge is not restricted by the case as it is presented.[285]

Interrogation of witnesses by the trial judge has traditionally been justified as a means to elicit the truth,[286] determine facts correctly,[287] and clarify the case to assist the jury.[288] Although the manner and extent of examination is within the trial judge's discretion,[289] courts have repeatedly cautioned that the judge must interrogate in a neutral and impartial manner.[290] In fact, federal courts have overturned convictions when

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[279] *E.g.*, Estrella-Ortega v. United States, 423 F.2d 508, 510 (9th Cir. 1970); Smith v. United States, 331 F.2d 265, 273 (8th Cir.), *cert. denied*, 379 U.S. 824 (1964); Fielding v. United States, 164 F.2d 1022, 1023 (6th Cir. 1947); Steinberg v. United States, 162 F.2d 120, 124 (5th Cir.), *cert. denied*, 332 U.S. 808 (1947).

[280] *E.g.*, United States v. Karnes, 531 F.2d 214, 216 (4th Cir. 1976); United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975); United States v. Liddy, 509 F.2d 428, 435 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 911 (1975); Riley v. Goodman, 315 F.2d 232, 234 (3d Cir. 1963); Holmes v. United States, 271 F.2d 635, 639 (4th Cir. 1959).

[281] *See* United States v. Lutwak, 195 F.2d 748, 754-55 (7th Cir.) (where prosecutor was unwilling to vouch for the witness' integrity and veracity, it was held proper for court to call a government witness and to allow cross-examination by both sides), *aff'd*, 344 U.S. 604 (1952).

[282] See note 125 *supra*.

[283] *See, e.g.*, United States v. Karnes, 531 F.2d 214, 216 (4th Cir. 1976) (trial judge not bound by case presented by parties and, where a party refuses to call a material witness, trial judge has authority, if not the duty, to call the witness); Chalmette Petroleum Corp. v. Chalmette Oil Distrib. Co., 143 F.2d 826, 828 (5th Cir. 1944) (same).

[284] C. McCormick, *supra* note 16, § 8, at 12.

[285] Fed. R. Evid. 614, Advisory Comm. Notes. The Advisory Committee also noted that retention of the judge's power to call witnesses will avoid the tendency of juries to associate a witness with the party calling him. *Id.*

[286] *E.g.*, United States v. Harris, 488 F.2d 867, 869 (8th Cir. 1973); Smith v. Welch, 189 F.2d 832, 837 (10th Cir. 1951).

[287] *E.g.*, United States v. Ball, 428 F.2d 26, 30 (6th Cir. 1970); United States v. Stirone, 311 F.2d 277, 279 (3d Cir. 1962), *cert. denied*, 372 U.S. 935 (1963).

[288] *E.g.*, United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975); United States v. Malcolm, 475 F.2d 420, 427 (9th Cir. 1973); United States v. Guglielmini, 384 F.2d 602, 605 (2d Cir. 1967). The judge may also, at his discretion, allow jurors to question a witness. United States v. Witt, 215 F.2d 580, 584 (2d Cir.), *cert. denied*, 348 U.S. 887 (1954).

[289] Powers v. J.B. Michael & Co., 329 F.2d 674, 677 (6th Cir.), *cert. denied*, 377 U.S. 980 (1960); *accord*, United States v. McCarthy, 196 F.2d 616, 619 (7th Cir. 1952).

[290] *See, e.g.*, United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975) (judge must be sensitive to his role as judge and the persuasiveness embodied in it); Anderson v. Great Lakes Dredge & Dock Co., 509 F.2d 1119, 1131 (9th Cir. 1974) (judge must use self-

the trial judge actively participated in the presentation of the case.[291] Similarly, the judge cannot give advice to either party in an effort to strengthen the party's case.[292] Rule 614 preserves the right of either party to cross-examine the court's witness,[293] and to object to calling or interrogation either at the time or when the jury is not present.[294] These safeguards, coupled with appellate review for abuse of discretion,[295] operate to restrain the overly zealous judge while relieving the parties from the embarrassment of having to object in the jury's presence.[296]

The Mississippi rule with respect to the court's calling and questioning witnesses is virtually identical to federal rule 614. Although the authority of a state court trial judge to call and interrogate witnesses is unquestioned,[297] the courts have admonished trial judges to maintain a stringent standard of impartiality.[298]

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restraint to avoid showing hostility to one party); United States v. Liddy, 509 F.2d 428, 440 (D.C. Cir. 1974) (judge should avoid extensive questioning), *cert. denied,* 420 U.S. 911 (1975); United States v. Green, 429 F.2d 754, 760 (D.C. Cir. 1970) (better for judge to err on side of abstention from intervention in case); United States v. Nazzaro, 472 F.2d 302, 310 (2d Cir. 1973) (judge must avoid even the appearance of partiality). The Advisory Committee noted that omission from rule 614 of a formula defining the proper manner and extent of the judge's interrogation in no sense precludes appellate courts from continuing to reverse for abuse. FED. R. EVID. 614, Advisory Comm. Notes.

[291] *See, e.g.,* United States v. Hill, 332 F.2d 105, 106-07 (7th Cir. 1964) (judge's questioning tended to impeach the credibility of a witness); United States v. Brandt, 196 F.2d 653, 656-57 (2d Cir. 1952) (judge asked over nine hundred questions and attempted to discredit defendant's testimony).

[292] *See* United States v. Carengella, 198 F.2d 3, 8 (7th Cir.) (no part of judge's duty to caution prosecuting attorney and aid government's case), *cert. denied,* 344 U.S. 881 (1952).

[293] *Accord,* Estrella-Ortega v. United States, 423 F.2d 509, 511 (9th Cir. 1970); Smith v. United States, 331 F.2d 265, 273 (8th Cir.) (privilege of cross-examination may be exercised by either party), *cert. denied,* 379 U.S. 824 (1964).

[294] *See* United States v. Green, 429 F.2d 754, 760 (D.C. Cir. 1970) (counsel has responsibility to make objection out of hearing of jury); Barba-Reyes v. United States, 387 F.2d 91, 93 (9th Cir. 1967) (defendant cannot obtain reversal on ground of court's questioning where no objection was made and questions were relevant to issues).

[295] *See* United States v. Medansky, 486 F.2d 807, 814 (7th Cir. 1973) (where his actions were not "deprecatory" or "antagonistic," trial judge did not overstep bounds of propriety), *cert. denied,* 415 U.S. 989 (1974); United States v. De Sisto, 289 F.2d 833, 834 (2d Cir. 1961) (trial judge must not usurp functions of jury).

[296] FED. R. EVID. 614, Advisory Comm. Notes.

[297] Hannah v. State, 336 So. 2d 1317, 1322 (Miss. 1976), *cert. denied,* 429 U.S. 1101 (1977); Ratliff v. State, 313 So. 2d 386, 388 (Miss. 1975); Moore v. Sykes' Estate, 167 Miss. 212, 219-20, 149 So. 789, 791 (1933).

[298] United States v. Hill, 496 F.2d 201, 202 (5th Cir. 1974); Jones v. State, 223 Miss. 812, 819-20, 79 So. 2d 273, 276, *cert. denied,* 350 U.S. 869 (1955); Breland v. State, 180 Miss. 830, 833, 178 So. 817, 818 (1938). *But cf.* Freeland v. Henderson, 252 So. 2d 899, 908 (Miss. 1971) (although trial judge is under no duty to determine if a witness is satisfied by his testimony, it was not reversible error for judge to ask witness if he had anything else to say).

Rule 615. Exclusion of Witnesses[299]

The exclusion of witnesses from the courtroom as a means of discouraging and exposing fabrication, inaccuracy, and collusion[300] is a matter traditionally addressed to the trial judge's discretion.[301] A party in federal court seeking sequestration of witnesses has the burden of proof to convince the judge that such action is proper.[302] Under rule 615, the judge has no discretion to deny a motion to exclude the witnesses unless the opposing party can show the court that a particular witness falls within one of the rule's three exceptions.[303] Witnesses who are specifically excepted from the operation of the exclusion rule include parties or their representatives[304] and one whose presence is shown to be essential to a party's presentation of its case.[305] Witnesses who most frequently have been regarded as essential and outside the exclusion

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[299] Fed. R. Evid. 615 provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

See Criminal Law ⚿ 665; Evidence ⚿ 550; Trial ⚿ 41.

[300] *See* Geders v. United States, 425 U.S. 80, 87 (1976) (necessary to prevent "tailored," "less than candid," or "improperly influenced" testimony); Taylor v. United States, 388 F.2d 786, 788 (9th Cir. 1967) (exclusion to prevent shaping of testimony); United States v. Leggett, 326 F.2d 613, 613-14 (4th Cir.) (same), *cert. denied*, 377 U.S. 955 (1964); 3 Weinstein's Evidence ¶ 615[01], at 615-4 (1976) (since shaping may be unconscious, the rule operates against "fabrication" as well as "falsification"). For a general discussion of the purposes for sequestration, see 6 J. Wigmore, *supra* note 49, §§ 1837-1838, at 455-67 (1976).

[301] Holder v. United States, 150 U.S. 91, 92 (1893); United States v. Maestas, 523 F.2d 316, 321 (10th Cir. 1975); United States v. Jewett, 520 F.2d 581, 584 (1st Cir. 1975); United States v. Robinson, 502 F.2d 894, 897 (7th Cir. 1974); United States v. Black, 412 F.2d 687, 691 (6th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1970); Young v. United States, 358 F.2d 429, 430-31 (9th Cir. 1966); Copeland v. United States, 343 F.2d 287, 289 (D.C. Cir. 1964). The judge's decision to sequester witnesses is reviewable only for abuse. United States v. Escobedo, 430 F.2d 603, 608-09 (7th Cir. 1970), *cert. denied*, 402 U.S. 951 (1971).

[302] Fenner, *supra* note 206, at 610.

[303] 3 Weinstein's Evidence ¶ 615[01], at 615-8 to -9 (1976) (the judge's discretion is limited to invoking the rule without request by counsel).

[304] The rule thus avoids due process problems for natural persons and the practical problems of representation of nonnatural persons by witnesses who may be sequestered. Fed. R. Evid. 615, Advisory Comm. Notes; 3 Weinstein's Evidence ¶ 615[01], at 615-7 to -8 (1976).

[305] Rule 615 shifts the burden of proof to the party against sequestration of a witness by requiring that party to establish the witness is essential and therefore exempt from sequestration. 3 Weinstein's Evidence ¶ 615[01], at 615-8 to -9 (1976).

rule include experts,[306] government investigative agents,[307] and persons such as agents who handled the transaction being litigated.[308]

The consequences of failure to comply with a sequestration order are not delineated in rule 615. Three methods of enforcement have been advanced:[309] (1) citing the witness for contempt,[310] (2) permitting comment on the witness' noncompliance as an attack on his credibility,[311] and (3) refusing to let the witness testify or striking the testimony.[312] Although the particular method to be used is discretionary with the trial judge,[313] a witness' testimony cannot be stricken merely on the basis of his noncompliance with the exclusion order.[314]

Mississippi follows the rule prevailing in federal courts prior to the adoption of the federal rules[315] and holds that the exclusion of witnesses is a matter solely within the trial judge's discretion.[316] On the other hand, Mississippi practice is similar to rule 615 in that it recognizes an

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[306] *See, e.g.*, Lewis v. Own, 395 F.2d 537, 541 (10th Cir. 1968) (within court's discretion to allow physician to remain in courtroom in medical malpractice suit); Williams v. Atlantic Coast Line R.R., 190 F.2d 744, 747 (5th Cir. 1951) (witness allowed to remain to assist counsel); Williams v. Electronic Control Sys., Inc., 68 F.R.D. 703, 704 (E.D. Tenn. 1975) (same).

[307] *See, e.g.*, United States v. Maestas, 523 F.2d 316, 321 (10th Cir. 1975) (FBI agent); United States v. Thor, 512 F.2d 811, 813 (5th Cir.) (narcotics agent), *cert. denied*, 423 U.S. 1014 (1975); United States v. Pellegrino, 470 F.2d 1205, 1208 (2d Cir. 1972) (FBI chief investigative agent), *cert. denied*, 411 U.S. 918 (1973).

[308] United States v. Burket, 480 F.2d 568, 572 (2d Cir. 1973); United States v. Frazier, 417 F.2d 1138, 1139 (4th Cir. 1969), *cert. denied*, 397 U.S. 1013 (1970).

[309] 3 WEINSTEIN'S EVIDENCE ¶ 615[01], at 615-10 (1976).

[310] *E.g.*, United States v. Eastwood, 489 F.2d 818, 821 (5th Cir. 1973); United States v. Leggett, 326 F.2d 613, 613-14 (4th Cir.), *cert. denied*, 377 U.S. 955 (1964); Shoemaker v. K-Mart, Inc., 294 F. Supp. 260, 261-62 (E.D. Tenn. 1968).

[311] Holder v. United States, 150 U.S. 91, 92 (1893); *accord*, United States v. Vario, 484 F.2d 1052, 1055-56 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974); United States v. Phifer, 400 F. Supp. 719, 734 (E.D. Pa. 1975).

[312] *E.g.*, Stone v. Wingo, 416 F.2d 857, 867 (6th Cir. 1969). *But cf.* Slocum v. United States, 325 F.2d 465, 467 (8th Cir. 1963) (refusal to strike testimony was not error).

[313] *E.g.*, Spindler v. United States, 336 F.2d 678, 682 (9th Cir. 1964), *cert. denied*, 380 U.S. 909 (1965); United States v. Leggett, 326 F.2d 613, 614 (4th Cir.), *cert. denied*, 377 U.S. 955 (1964).

[314] Holder v. United States, 150 U.S. 91, 92 (1893); *see* United States v. Torbet, 496 F.2d 154, 157-58 (9th Cir.) (abuse of discretion to disqualify witness absent collusion with defendant or his counsel), *cert. denied*, 419 U.S. 857 (1974); United States v. Schaefer, 299 F.2d 625, 631 (7th Cir.) (court is not to deny testimony unless witness' presence in courtroom is with "consent, contrivance, procurement or knowledge of the [party sponsoring the witness] or his counsel"), *cert. denied*, 370 U.S. 917 (1972); Robinson v. State, 340 F. Supp. 82, 85 (E.D. Tenn.) (exclusion of testimony material to defendant's case violates right of confrontation where neither defendant nor his counsel was at fault), *aff'd*, 474 F.2d 1273 (6th Cir.), *cert. denied*, 414 U.S. 894 (1973).

[315] See note 301 *supra*.

[316] Johnson v. State, 346 So. 2d 927, 930 (Miss. 1977).

exception to the general exclusion rule for parties[317] and witnesses deemed essential to a party's presentation of its case.[318] Although the remedy for noncompliance in state courts is again left to the discretion of the trial judge,[319] the Mississippi Supreme Court has indicated that it does not favor disqualifying a witness' testimony because of a violation of a sequestration order.[320]

Conclusion

Although there are many similarities, the Federal Rules of Evidence represent several drastic departures from Mississippi procedure regarding witnesses and evidence. To the extent that codification and certainty in the law is desirable, the rules are a starting point. It has been said of the Federal Rules of Civil Procedure: they are a few simple rules designed to facilitate the practice of law. But since they were adopted, the best legal minds have written volumes to explain what those few simple rules mean. That is where we are now with the new rules of evidence. On the surface, they appear relatively simple, but in depth, they present many questions and problems which the courts and the legal scholars shall, no doubt, be interpreting and explaining for years to come.

A challenge appeals to all of us. Otherwise, we would not be practicing law. The Federal Rules of Evidence certainly represent another challenge to trial lawyers, particularly those who are not in position to devote themselves primarily to federal practice but must also practice law in the various state courts. The proliferation of all kinds of rules of court is nothing less than frightening to many practitioners. No lawyer, consciously at least, wants to be in contempt of court or embarrassed for violation of some obscure rule. All trial lawyers have a fear of inadvertently finding themselves in just this situation as they change from court to court. Thus, the Federal Rules of Evidence represent the

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[317] Grimes v. Grimes, 197 Miss. 315, 317, 20 So. 2d 662, 663 (1945); Ferguson v. Brown, 75 Miss. 214, 224, 21 So. 603, 605 (1897). A party may be required to testify first. If he refuses to do so, he may be excluded until he testifies. A witness, however, cannot be kept from testifying unless he has been given the choice of testifying first or leaving the room. Wilson v. Peacock, 111 Miss. 116, 120, 71 So. 296, 297-98 (1916).

[318] Providence Washington Ins. Co. v. Weaver, 242 Miss. 141, 152, 133 So. 2d 635, 639-40 (1961); Smith v. State, 95 Miss. 786, 794, 49 So. 945, 948 (1909).

[319] Chilcutt v. Keating, 220 Miss. 545, 552, 71 So. 2d 472, 475 (1954); Taylor v. State, 30 So. 657, 658 (Miss. 1901).

[320] *See, e.g.*, Savell v. Schultz, Baujan & Co., 213 Miss. 427, 433, 57 So. 2d 151, 154 (1952) (witness allowed to testify in action on an open account); Thomas v. State, 103 Miss. 800, 805-06, 60 So. 781, 781 (1913) (within court's discretion to allow testimony of witness violating the rule).

newest challenge in the never-ending struggle to develop and maintain a reasonable degree of competence in the practice of law and, particularly, in trial work.

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RECENT DECISIONS

TITLE VII—BURDEN OF PROOF—EMPLOYER NOT REQUIRED TO SHOW BUSINESS NECESSITY WHERE QUALIFICATION MANIFESTLY RELATED TO JOB

Varice Smith, Jr., a black laborer, brought an action[1] against his former employer Olin Corporation[2] alleging that his discharge from employment was violative of 42 U.S.C. § 1981[3] and Title VII of the Civil Rights Act of 1964.[4] Permanent employment with Olin Corporation was subject to Smith's passing a physical examination; thus, when the firm discovered that Smith had a degenerative spinal condition, he was discharged.[5] Smith contended that his employment had been terminated because Olin suspected he had sickle cell anemia,[6] a disease common to black Americans,[7] and therefore his release was unjust for reasons made illegal by Title VII.[8] Olin contended that Smith was discharged solely because of his bad back. The United States District Court for the Western District of Louisiana entered summary judgment for the defendant.[9] On appeal

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[1] The opinions do not specify the relief sought. Smith v. Olin Chemical Corp., 535 F.2d 862 (5th Cir. 1976), *rev'd en banc*, 555 F.2d 1283 (1977). The type of relief awarded for unlawful discharge under Title VII is discretionary with the court, but can include reinstatement with backpay and full seniority. *See, e.g.*, Dewey v. Reynolds Metals Co., 300 F. Supp. 709, 715 (W.D. Mich. 1969), *rev'd on other grounds*, 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court mem.*, 402 U.S. 689 (1971). The rationale for granting relief in the employment discrimination context is "to restore [those wronged] to their rightful economic status absent the effects of . . . unlawful discrimination." Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *accord*, Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).

[2] The complaint incorrectly named the firm Olin Chemical Corporation. Smith v. Olin Chemical Corp., 535 F.2d 862, 863 n.1 (5th Cir. 1976).

[3] 42 U.S.C. § 1981 (1970). Section 1981 was derived from the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, *as reenacted by* Enforcement Act of 1870, ch. 114, §§ 16 & 18, 16 Stat. 140, 144. *See generally* Brooks, *Use of the Civil Rights Act of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258, 259 (1977); Comment, *Racial Discrimination in Employment under the Civil Rights Act of 1866*, 36 U. CHI. L. REV. 615, 617-21 (1969). See note 14 *infra*.

[4] Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975).

[5] Smith passed a preemployment physical examination and was hired for a ninety day probationary period as a laborer. After performing satisfactorily during the period, he underwent a physical examination required of all permanent employees. Olin's doctor concluded from X-rays of Smith's back that he had "bone degeneration with a prognosis of possible aseptic necrosis or further bone degeneration in his spinal region and was physically disqualified for any manual labor job at the plant . . . ." 535 F.2d at 863.

[6] Smith had a history of sickle cell anemia. When apprised of the diagnosis based on the X-rays of his back, Smith informed the doctor that his condition might have resulted from his history of sickle cell anemia. One day later he was discharged. *Id.*

[7] Sickle cell anemia is "a blood disease found almost exclusively in descendants of tribes living in malarial regions of Africa." 555 F.2d at 1284.

[8] 535 F.2d at 863 n.2.

[9] In an unreported decision, the United States District Court for the Western District

to the United States Court of Appeals for the Fifth Circuit, Smith amended his complaint,[10] stating that his discharge was violative of Title VII since Olin's good back requirement disqualified disproportionately more blacks than whites.[11] A panel of the court of appeals affirmed the district court's holding as to Olin's reasons for discharging Smith but reversed the summary judgment and remanded to the district court in order to enable Smith to submit proof that Olin's practice had a disproportionate impact on blacks. On rehearing en banc the court of appeals, *held*, reversed. Where a facially neutral job requirement that has a disproportionate impact on a class protected by Title VII of the Civil Rights Act of 1964 is manifestly job related, the employer will not be required to submit proof of business necessity to warrant its use. *Smith v. Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977) (en banc).

Prior to the enactment of the Civil Rights Act of 1964,[12] there was no fixed legal definition of discrimination in the employment context.[13] The only remedy available to blacks and other minority members victimized by discriminatory employment practices was an action under 42 U.S.C. § 1981.[14] During this period, the courts used two tests for measuring the nature and extent of discrimination in employment. Initially, the dominant definition of discrimination was based on the "evil motive" test.[15] This test presented virtually insuperable prob-

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of Louisiana found "the uncontroverted matter before the court" did not show that Olin had any knowledge or suspicion of Smith's history of sickle cell anemia until after the firm's doctor had informed him that he was disqualified from manual labor at the plant. *Id.* at 863.

[10] The prevailing view is that one may not allege new facts on appeal to resist summary judgment. 6 MOORE'S FEDERAL PRACTICE ¶ 56.27[1], at 1557 (2d ed. 1976). In the Title VII context, however, courts have been "very liberal rather than technical in pleading requirements." 535 F.2d at 863-64.

[11] Smith based his contention on the fact that sickle cell anemia affects blacks almost exclusively. He reasoned that since bone degeneration is a common condition resulting from the disease, bad backs are present among a disproportionate number of blacks in the labor force. Since Olin's good back requirement disqualified more blacks than whites, the requirement was discriminatory. 535 F.2d at 864.

[12] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

[13] M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 42-43 (1966); Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59, 66 (1972).

[14] 42 U.S.C. § 1981 (1970) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[15] Blumrosen, *supra* note 13, at 67-70. Improper motive was present where there was evidence of economic injury motivated by a personal dislike of the group of which the injured person was a member. *Id.* at 67. *See generally* Bonfield, *The Substance of American Fair Employment Practice Legislation I: Employers,* 61 NW. U.L. REV. 907, 955-56

lems of proof and, as a result, was replaced with the intentional unequal treatment concept.[16] Because of the subjectivity inherent in these tests,[17] and in response to the 1962 unemployment statistics[18] and the national trend favoring equal employment opportunity,[19] Congress incorporated Title VII into the Civil Rights Act of 1964.[20] The objective of this portion of the Act was to guarantee that individual qualifications would be the sole consideration in employment.[21] To obtain the goal of equal employment opportunity, Congress strictly prohibited any employment practice using the individual's race, color, sex, religion or national origin as a factor.[22] The only exception to such prohibition was the use

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(1967); Note, *An American Dilemma—Proof of Discrimination*, 17 U. CHI. L. REV. 107, 109 (1949).

[16] Blumrosen, *supra* note 13, at 68-69. The test provided a mechanism for proving the evil motive required under the earlier concept, *id.* at 69, and defined discrimination as causing economic injury to an individual by treating members of a minority group in a different and less favorable fashion than similarly situated members of the majority group, *id.* at 67. *See generally* Note, *The New York State Commission Against Discrimination: A New Technique for an Old Problem*, 56 YALE L.J. 837, 849 (1947) (describing the incorporation of the intentional unequal treatment concept into New York statute). The federal courts employed this concept in the 1940's to determine whether the fixing of black school teachers salaries was racially discriminatory in violation of the fourteenth amendment. *See, e.g.*, Morris v. Williams, 149 F.2d 703, 706 (8th Cir. 1945) (compared salaries of similarly qualified black and white teachers and principals); Freeman v. County School Bd., 82 F. Supp. 167, 170-71 (E.D. Va.) (same), *aff'd per curiam*, 171 F.2d 702 (4th Cir. 1948). The malice test and the intentional unequal treatment test were both erroneously applied prior to 1971 with respect to Title VII. *See generally* Jones, *The Development of the Law under Title VII Since 1965: Implications of the New Law*, 30 RUTGERS L. REV. 1, 2 (1976).

[17] Only 62 cases were brought to trial before 1964 by 12 state civil rights agencies set up in the 1940's and 1950's to eliminate racial discrimination in employment. S. REP. NO. 867, 88th Cong., 2d Sess. 7 (1964). For discussions of the need for a shift from a subjective to objective concept of discrimination, see Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1669-1679 (1969); Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268 (1969).

[18] The unemployment rate for blacks in 1962 was approximately double that for whites in almost every category. H.R. REP. NO. 914-2, 88th Cong., 1st Sess. 26-30 (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2487, 2513-16.

[19] Twenty-five states had already passed some type of fair employment legislation at the time of the congressional debates on the Civil Rights Act of 1964. *Id.* at 28-29, [1964] U.S. CODE CONG. & AD. NEWS at 2518.

[20] 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975).

[21] H.R. REP. NO. 914-2, 88th Cong., 1st Sess. 29 (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2487, 2516.

[22] 42 U.S.C. § 2000e-2(a) (1970 & Supp. V 1975) provides that it shall be unlawful for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employ-

of a "professionally developed ability test"[23] or a "bona fide occupational qualification."[24] Consequently, employers were able to comply with Title VII's literal language by using facially neutral employment criteria, even if the criteria had discriminatory effects.[25] But in their initial judicial decisions in this area, the federal courts liberally interpreted the scope of Title VII,[26] concentrating on the adverse consequences that purported discriminatory practices visited upon minorities rather than the state of mind of the alleged discriminator.[27] The "consequences" test provided an objective standard by which to judge questioned employment practices.[28]

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ment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[23] *Id.* § 2000e-2(h) (1970). For discussions of professionally developed ability tests, see Comment, *Employment Testing Under Title VII of the Civil Rights Act of 1964,* 12 B.C. INDUS. & COM. L. REV. 268, 276 (1970); Comment, *Civil Rights—Employee Testing,* 7 WAKE FOREST L. REV. 425, 429 (1971).

[24] 42 U.S.C. § 2000e-2(e) (1970). The section allows a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise" involved. For discussions of bona fide occupational qualifications, see Oldham, *Questions of Exclusion and Exception Under Title VII—"Sex-Plus" and the BFOQ,* 23 HASTINGS L.J. 55 (1971); Shannan, *Toward Defining and Abolishing the Bona Fide Occupational Qualification, Based on Class Status,* 22 LAB. L.J. 332 (1971); 8 Wake Forest L. Rev. 124 (1971).

[25] *See* Cooper & Sobol, *supra* note 17, at 1599 (although phrased in racially neutral terms, hiring and promotional standards may exclude blacks from job opportunities and are important factors in minority unemployment and underemployment).

[26] Jones, *supra* note 16, at 3.

[27] Discrimination under the "consequences" concept is defined as conduct that has a detrimental effect on individuals in a minority group as compared to individuals in the majority group. Blumrosen, *supra* note 13, at 67. The origins of this concept, which emphasizes effect rather than intent, can be traced in part to the common law doctrine that a person intends the foreseeable consequences of his actions. Cooper & Sobol, *supra* note 17, at 1674 n.15. The concept may also be derivative of the common law concept of interference with advantageous relations, Blumrosen, *supra* note 13, at 71-72, which also looked to effect as indicia of intent, W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 129, 130, at 938, 952 (4th ed. 1971). *See generally* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426-27 (8th Cir. 1970) (refusal to hire); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970) (transfers), *cert. denied,* 401 U.S. 954 (1971); Local 189, Papermakers & Paperworkers v. United States, 416 F.2d 980, 989 (5th Cir. 1969) (job seniority system), *cert. denied,* 397 U.S. 919 (1970); Gregory v. Litton Systems, Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (withdrawal of offer of employment previously made), *modified,* 472 F.2d 631 (9th Cir. 1972); Hicks v. Crown Zellerbach Corp., 310 F. Supp. 536, 537 (E.D. La. 1970) (separate local unions for black and white members); Clark v. Am. Marine Corp., 304 F. Supp. 603, 607 (E.D. La. 1969) (word of mouth hiring); Dobbins v. Local 212, IBEW, 292 F. Supp. 413, 448 (S.D. Ohio 1968) (union discrimination); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 519 (E.D. Va. 1968) (job seniority system).

[28] In Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 519 (E.D. Va. 1968), the seminal case on this point, the court applied an objective test for discrimination based on an interpretation of the intent requirement contained in § 706(g) of Title VII. The codifica-

Two other important concepts applicable to employment discrimination cases originated during early judicial interpretation of Title VII. Beginning in 1968, the federal courts recognized the use of statistics to establish a prima facie case of racial discrimination,[29] thus allowing a plaintiff to shift the burden of proof to the alleged discriminator.[30] Additionally, the defense of justification by business necessity[31] was first recognized with respect to Title VII in 1969 when the federal judiciary began construing section 703(h).[32] These concepts—the

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tion of § 706(g), 42 U.S.C. § 2000e-5(g) (Supp. V 1975), provides in pertinent part: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice . . . ." In determining that Title VII requires scrutiny of the effects of employment practices, the *Quarles* court discarded the subjective tests of discrimination. 279 F. Supp. at 519. *See generally* Blumrosen, *supra* note 13, at 70-71; Jones, *supra* note 16, at 2.

[29] This concept had developed long before the passage of Title VII in challenges to racially exclusionary grand jury selection procedures brought under the fourteenth amendment. *See* Norris v. Alabama, 294 U.S. 587, 590, 592, 595, 596-98 (1935) (statistics showed systematic exclusion of blacks from Alabama grand juries). Since 1935 the Supreme Court and the lower federal courts have permitted the use of statistics to shift the burden of proof in various challenges to racially discriminatory state action brought under the fourteenth amendment. *See, e.g.,* Swain v. Alabama, 380 U.S. 202, 205-07 (1965) (grand jury case); Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 654 (4th Cir. 1967) (en banc) (black doctor denied admission to staff); Alabama v. United States, 304 F.2d 583, 586 (5th Cir.) (voting case), *aff'd per curiam,* 371 U.S. 37 (1962). In Alabama v. United States, the court stated, "In the problem of racial discrimination, statistics often tell much, and courts listen." 304 F.2d at 586. *See generally* Fiss, *Gaston County v. United States: Fruition of the Freezing Principle,* 1969 Sup. Ct. Rev. 379, 393.

[30] *See, e.g.,* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970) (few blacks hired); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970) (no black line drivers from 1964 to 1968), *cert. denied,* 401 U.S. 954 (1971); United States v. Hayes Int'l Corp., 415 F.2d 1038, 1043 (5th Cir. 1969) (96% of white workers in highest paying grades, 77% of black workers in lowest paying grades); Dobbins v. Local 212, IBEW, 292 F. Supp. 413, 417 (S.D. Ohio 1968) (union with 800 white members and no black members). *See generally* Fiss, *A Theory of Fair Employment Laws,* 38 U. Chi. L. Rev. 235, 269-73 (1971).

[31] This defense also has origins prior to the passage of Title VII. *See* Whitefield v. United States Steelworkers, Local 2708, 263 F.2d 546, 551 (5th Cir.) (provisions in collective bargaining agreement affecting black workers differently from white workers must be relevant), *cert. denied,* 360 U.S. 902 (1959); *cf.* Steele v. Louisville & Nash. R.R., 323 U.S. 192, 203 (1944) (discrimination must be based on relevant differences, not on race).

[32] 42 U.S.C. § 2000e-2(h) (1970). The defense of justification by business necessity, based on an interpretation of § 703(h), was developed in Local 189, Papermakers & Paperworkers v. United States, 416 F.2d 980, 989 (5th Cir. 1969) (discriminatory practices must yield unless an overriding business purpose exists), *cert. denied,* 397 U.S. 919 (1970). While *Papermakers* involved a challenge to a seniority system that carried forward the effects of past discrimination, the defense of justification by business necessity is equally applicable to employment requirements which have a disproportionate impact on minorities. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (employment practice must be shown to be related to job performance); Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). *Papermakers'* recognition of the defense was followed by several courts

objective standard of discrimination, the establishment of a prima facie case based on statistics, and the defense of justification by business necessity—all of which were developed by the lower courts in the early litigation under Title VII, were adopted by the Supreme Court in 1971 in its first ruling on the substantive rights contained in Title VII,[33] *Griggs v. Duke Power Co.*[34] In *Griggs*, a class action brought by two classes of black employees,[35] the plaintiffs alleged that certain prerequisites to hiring and transfer[36] illegally discriminated against black workers. The theory asserted by the plaintiffs marked the first time a federal court was presented with the task of adjudicating under Title VII the legality of a job qualification which had only a disparate effect on blacks and was not shown to be job related.[37] On appeal,[38] the Supreme Court decided

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before 1971. *See, e.g.*, Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970) (policy which has discriminatory effects must be shown to be necessary to operation of business), *cert. denied*, 401 U.S. 954 (1971); Griggs v. Duke Power Co., 420 F.2d 1225, 1230-31 (4th Cir. 1970) (education requirement for transfer must be based on business necessity), *rev'd on other grounds*, 401 U.S. 424 (1971).

[33] The first Title VII cases to reach the Supreme Court involved procedural issues and issues of minor substantive significance. *See, e.g.*, Phillips v. Martin Marietta, 400 U.S. 542, 543 (1971) (per curiam) (remand for improper summary judgment); Crosslin v. Mountain States Tel. & Tel. Co., 400 U.S. 1004 (1971) (per curiam) (EEOC procedural issue).

[34] 401 U.S. 424 (1971).

[35] One class of plaintiffs consisted of six black employees who were employed prior to 1965 when Duke Power Company openly discriminated in hiring on the basis of race. Their contention was that the company's educational requirements for transfer to better positions served to perpetuate the effects of prior discrimination and were thus illegal under Title VII. Griggs v. Duke Power Co., 292 F. Supp. 243, 247 (M.D.N.C. 1968), *rev'd in part*, 420 F.2d 1225 (9th Cir. 1970), *rev'd in part*, 401 U.S. 424 (1971). The *Griggs* plaintiffs' position was based on Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), which held that under § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1970), relief may be granted to remedy present and continuing effects of discrimination which occurred before the Act became effective. 279 F. Supp. at 516-18.

The second class consisted of four blacks hired after 1965. They claimed that the company's educational requirements for hiring and transfer had a disparate impact on blacks and were thus violative of Title VII, unless shown to be job related by the standards of § 703(h). Griggs v. Duke Power Co., 420 F.2d 1225, 1231-32 (4th Cir. 1970), *rev'd in part*, 401 U.S. 424 (1971).

[36] Prior to July 2, 1965, the effective date of Title VII, the company openly discriminated on the basis of race in hiring. Blacks were only allowed to be employed in the labor department, the lowest job category. After the company discarded the policy of limiting blacks to the labor department in 1965, it designated completion of high school as a prerequisite to transfer from labor to any other department. The company also added the requirement that employees hired after July 2, 1965, pass two professionally prepared aptitude tests to work in departments other than labor. Finally, in September 1965, the company began the policy of permitting incumbent employees who did not meet the educational requirements to transfer out of labor if they passed two tests, a general intelligence test and a mechanical ability test, neither of which was designed or intended to measure the ability to perform a particular job. Griggs v. Duke Power Co., 401 U.S. 424, 427-28 (1971).

[37] The novelty of this theory was not mentioned by the district court, but was pointed out explicitly by the court of appeals. 420 F.2d at 1231. The Supreme Court also recog-

unanimously that where the use of tests or requirements operates to "freeze" the status quo of prior discriminatory employment practices they cannot be maintained.[39] More importantly, however, the Court held that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[40] With this holding the disproportionate impact rule was born.[41] In describing the elements of the rule, *Griggs* specified that neither benign intent nor absence of discriminatory intent on the part of the employer would "redeem" practices with a disparate impact on minorities.[42] The Court also ruled that the burden of proof shifts to the employer

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nized that the issue was one of first impression for the district court and court of appeals, 401 U.S. at 428, because all prior cases which held that employment practices were illegal under Title VII had been concerned with the practice of employers "freezing" the status quo of discrimination occurring before the Act took effect. See notes 30 & 32 *supra*. *See generally* Blumrosen, *supra* note 13, at 71; Jones, *supra* note 16, at 5.

[38] The district court rejected the claims of both classes of employees. 292 F. Supp. at 252. The court of appeals reversed the district court's holding as to the class of employees hired before 1965, and affirmed its holding as to the class hired after 1965. 420 F.2d at 1235-37.

[39] 401 U.S. at 430. In holding that practices which perpetuate the effects of pre-Act discrimination are actionable under Title VII, *id.*, the Court impliedly affirmed *Quarles* and its progeny. *See* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 427 (8th Cir. 1970); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 248-49 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); United States v. Dillon Supply Co., 429 F.2d 800, 803-04 (4th Cir. 1970); United States v. IBEW, Local 38, 428 F.2d 144, 149-51 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); Local 189, Papermakers & Paperworkers v. United States, 416 F.2d 980, 991-94 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); United States v. Sheet Metal Workers, Local 36, 416 F.2d 123, 131-32 (8th Cir. 1969); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047, 1054-55 (5th Cir. 1969); Dobbins v. Local 212, IBEW, 292 F. Supp. 413, 445 (S.D. Ohio 1968); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968). The concept of remedying the present effects of past discrimination was recognized with respect to the fourteenth amendment before 1968. *See* United States v. Louisiana, 225 F. Supp. 353, 396 (E.D. La. 1963) (voting discrimination), *aff'd*, 380 U.S. 145 (1965). Taken literally, the Court's holding in *Griggs* as to employment practices which "freeze" the status quo of prior discriminatory employment practices means that any practice which so operates is prohibited. The defense of justification by business necessity is recognized by courts with respect to such practices, even though such a defense is rarely sustained. *See, e.g.*, Sabala v. Western Gillette, Inc., 516 F.2d 1251, 1255 (5th Cir. 1975) (seniority system); Muller v. United States Steel Corp., 509 F.2d 923, 928-29 (10th Cir.) (chicano promotions), *cert. denied*, 423 U.S. 825 (1975). *See generally* Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 100 (1974).

[40] 401 U.S. at 431.

[41] By reversing the court of appeals on this point, a new cause of action was created under Title VII. The requisite elements of this action are simply: (1) an employment practice (2) which has a disproportionate impact (3) on a class protected by Title VII. Once these elements have been established, the employer must come forward with proof of business necessity. *Id.* at 431. *See generally* Blumrosen, *supra* note 13, at 90-91; Sutter, *Current Procedural and Evidentiary Considerations under Title VII of the Civil Rights Act of 1964: Ready for the Defense*, 6 GA. L. REV. 505, 514-16 (1972).

[42] 401 U.S. at 432. The Court held that "Congress directed the thrust of the Act to

once a prima facie case has been established by statistical evidence.[43] The *Griggs* Court adopted the defense of justification by business necessity[44] based on an EEOC[45] interpretation of section 703(h),[46] even though the Court's opinion did not describe in detail what an employer must prove to avail himself of the defense.[47] As a result, *Griggs* set the tone for lower federal courts to stringently scrutinize employment practices which have a disparate impact on blacks.[48]

In *McDonnell Douglas Corp. v. Green*,[49] the Supreme Court added sub-

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the *consequences* of employment practices, not simply the motivation." *Id.* See note 27 *supra*.

[43] 401 U.S. at 432. Proof of disproportionate impact by statistics is now well established, *see, e.g.*, Sagers v. Yellow Freight System, Inc., 529 F.2d 721, 729 (5th Cir. 1976) (one black road driver out of nation-wide system); United States v. T.I.M.E.—D.C., 517 F.2d 299, 313 (5th Cir. 1975) (statistics showed impediment to free transfer of minority group employees within company), *vacated on other grounds sub nom.*, International Bhd. of Teamsters v. United States, 431 U.S. 326 (1977), as is the shifting of the burden of proof to the employer, *see, e.g.*, Thompson v. McDonnell Douglas Corp., 552 F.2d 220, 221 (8th Cir. 1977) (denial of promotion); Waters v. Furnco Constr. Corp., 551 F.2d 1085, 1089 (7th Cir. 1977) (hiring practices).

[44] 401 U.S. at 431-32.

[45] The Equal Employment Opportunity Commission (EEOC) is the federal agency created to administer Title VII. 42 U.S.C. § 2000e-4 (1970). *See generally* Katz, *Investigation and Conciliation of Employment Discrimination Charges Under Title VII: Employers' Rights in an Adversary Process*, 28 HASTINGS L.J. 877 (1977); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

[46] 401 U.S. at 436. The EEOC regulations provide:

> The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

29 C.F.R. § 1607.3 (1975).

[47] The Court was not confronted with this problem since Duke Power Co. admitted that its tests were not intended to measure ability to perform a particular job. 401 U.S. at 425-26, 431.

[48] *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

> [T]he business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

444 F.2d at 798 (footnote omitted); *accord*, United States v. St. Louis—S.F. Ry., 464 F.2d 301, 308 (8th Cir. 1972) (must be essential to goals), *cert. denied*, 409 U.S. 116 (1973); United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971) (same), *cert. denied*, 406 U.S. 906 (1972).

[49] 411 U.S. 792 (1973). The plaintiff in the case was a civil rights activist who engaged in an illegal "stall-in," stopping his car on a busy thoroughfare in attempts to block other employees of the firm from getting to work. He was discharged and the denial of his application for reinstatement cited the illegal conduct as grounds. He then brought suit claiming his discharge was racially motivated and that the firm's hiring practices were

stance[50] to *Griggs*. After describing the jurisdictional prerequisites to an action under Title VII,[51] the Court held that the Act does not limit a complainant's right to sue on allegations which the EEOC had previously determined not to constitute "reasonable cause" for action.[52] Setting out the order and allocation of proof in a private action under Title VII, the decision explained that the complainant carries the initial burden of proof of establishing a prima facie case,[53] which, if accomplished, shifts the burden of proof to the employer.[54] Finally,[55] the Court added the pretext element to Title VII litigation that pro-

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discriminatory in general. *Id.* at 794-96. The Supreme Court held that the discharge of the plaintiff was not violative of Title VII because the employer had discharged his burden of proof by assigning the plaintiff's participation in unlawful conduct as the reason for his dismissal. *Id.* at 802-03. The Court stated explicitly, however, that the case did not involve the issue of employment qualifications: "We note that the issue of what may properly be used to test qualifications for employment is not present in this case." *Id.* at 802 n.14.

[50] The Court stated certiorari was granted "[i]n order to clarify the standards governing the disposition of an action challenging employment discrimination . . . ." 411 U.S. at 798.

[51] 411 U.S. at 798. The prerequisites, as enumerated in the Act, 42 U.S.C. § 2000e-5(a) to (e) (Supp. V 1975), are in essence "the filing of timely charges of employment discrimination with the Commission . . . and . . . receiving and acting upon the Commission's statutory notice of a right to sue. . . ." 411 U.S. at 798.

[52] 411 U.S. at 798-99. Under the EEOC guidelines the Commission must determine "that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring" before it can take official action. 29 C.F.R. § 1601.19b(a).

[53] As the Court notes in *McDonnell Douglas*, the requisite elements for establishing a prima facie case of a violation of Title VII will, of necessity, vary under differing factual situations. 411 U.S. at 802 n.13.

[54] 411 U.S. at 802.

[55] The Court also added substance to *Griggs* by implication in *McDonnell Douglas*. One question still unanswered after *Griggs* concerned the amount of proof necessary to overcome a prima facie case of discriminatory employment practices. *See* note 47 and accompanying text *supra*. By citing Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972), and Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972), the Court implied the employer carries a heavy burden. The *Castro* and *Chance* decisions were cited in *McDonnell Douglas* in a footnote along with *Griggs* after the Court stated that employment tests and qualifications which have an exclusionary effect on minority applicants must be "shown to bear a demonstrable relationship to the successful performance of the jobs" for which they are used. 411 U.S. at 802 n.14 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). *Castro* held that the employer "must come forward with convincing facts" to show that his racially exclusionary job qualifications are substantially related to job performance, 459 F.2d at 732, and in *Chance* the court stated that an employer has a "heavy burden" in justifying his challenged qualifications. 458 F.2d at 1176.

Another question *Griggs* arguably left unanswered was whether the southern pattern of dejure segregation must be present before the disproportionate impact rule enunciated in *Griggs* is applied. The Court's reliance on the *Castro* and *Chance* decisions also answers this question by implication since both cases were decided in the northeast. Since the Court cited these cases with approval, it can be assumed that a setting of prior de jure segregation, as in *Griggs*, is not an element which affects substantive rights under Title VII. Jones, *supra* note 16, at 7.

vides a mechanism by which a complainant may still establish a violation of Title VII even after the employer's burden of proof has been discharged. Thus, a plaintiff is allowed to submit proof that the explanation the employer presented to discharge the burden of proof was a "mere pretext" to mask racial discrimination in employment.[56] While *McDonnell Douglas* added substance to *Griggs*, the standard of proof for job relatedness under Title VII remained undefined.[57] *Albemarle Paper Co. v. Moody*,[58] a more recent Supreme Court interpretation of Title VII,[59] filled this void by establishing objective standards an employer must meet in order to prove that employment qualifications with disparate effects on minorities are not violative of Title VII.[60] Initially the Court summarized its holdings in *Griggs* and *McDonnell Douglas*, and in doing so apparently advocated a "no alternative" approach to the employment qualification standard.[61] The Court then proceeded to endorse the EEOC guidelines,[62]

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[56] The Court held that even though the employer had discharged his burden of proof by assigning the plaintiff's illegal conduct as the reason for his dismissal, the case should be remanded to the district court to enable the plaintiff to submit proof that the employer's explanation was a "mere pretext" to mask racial discrimination in employment. 411 U.S. at 804.

[57] "The appropriate standard of proof for job relatedness has not been clarified until today." Albermarle Paper Co. v. Moody, 422 U.S. 405, 436 (1976).

[58] 422 U.S. 405 (1976), *noted in* 50 N.C.L. REV. 1161 (1972).

[59] Mention should be made of a later equal protection decision which has wide implications for the area of employment discrimination in general, Washington v. Davis, 426 U.S. 229 (1976). The Supreme Court, in deciding on a challenge to the District of Columbia's police force hiring qualifications, held that under the equal protection component of the fifth amendment due process clause, an employment practice which has a disparate impact on minorities must be shown to have been implemented with discriminatory intent to be invalid. *Id.* at 238-42. The decision, however, did not overrule the *Griggs* line of cases. Indeed, there was an explicit recognition that the logic of Title VII is exclusive of the equal protection context:

> Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, *discriminatory purpose need not be proved,* and that it is an insufficient response to demonstrate some rational basis for the challenged practices. . . . *However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts . . . than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed.*

Id. at 246-47 (emphasis added). For a discussion of the possible ramifications of Washington v. Davis on employment discrimination in general, see Lerner, Washington v. Davis: *Quantity, Quality and Equality in Employment Testing,* 1976 SUP. CT. REV. 263.

[60] 422 U.S. at 425-36. See note 64 *infra.*

[61] See Note, *supra* note 39, at 101. The "no alternative" theory has been described as focusing on two factors: "(1) Does the practice serve a legitimate business purpose? (2) Is there available an alternative practice which will equally well promote the business purpose and yet will have a lesser disparate impact on blacks?" *Id.* In *Albermarle Paper* the Court stated: "If an employer does then meet the burden of proving that his tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's

under which the employer must show that his qualifications for hiring or promotion are "significantly correlated"[63] with predicted job performance. By enforcing these technical standards, the Court placed a heavier burden of proof on the employer than ever before.[64]

In the instant case, the court reasoned that since the qualification of having a good back is required of all employees in jobs involving manual labor, the qualification is facially neutral.[65] Furthermore, common sense dictates that a good back is necessary for manual labor, and consequently such a qualification is obviously job related.[66] The court concluded that since the facially neutral employment qualification of a good back is so obviously related to job performance in manual labor, the employer is not required under Title VII to justify the qualification by submitting proof of business necessity, even though such qualification may have a disparate impact on blacks.[67]

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legitimate interest 'in efficient and trustworthy workmanship.'" 422 U.S. at 425. This approach was first applied in Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971). See note 48 *supra.* The no-alternative test has been likened to the "strict scrutiny" test employed in cases brought under the equal protection components of the fifth and fourteenth amendments of the United States Constitution. Jones, *supra* note 16, at 10. *See generally* Lerner, *supra* note 59. Under the strict scrutiny test, if governmental action infringes on a racial or other suspect classification the government must come forward with proof that such classification is necessary to promote a compelling interest. San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 18 (1973). *See generally* 48 Miss. L.J. 135, 136 (1977). The no alternatives test has been referred to as "the compelling business necessity test." United States v. N.L. Indus., Inc., 479 F.2d 354, 364 (8th Cir. 1973).

[62] 422 U.S. at 430-31. "The EEOC Guidelines are not administrative 'regulations' promulgated pursuant to formal procedures established by the Congress. But . . . they do constitute '[t]he administrative interpretation of the Act by the enforcing agency,' and consequently they are 'entitled to great deference.'" 422 U.S. at 431.

[63] 29 C.F.R. § 1607.4(c) (1975).

[64] The Court stated:

> The message of these Guidelines is the same as that of the *Griggs* case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or *significantly correlated* with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."

422 U.S. at 431 (emphasis added) (quoting 29 C.F.R. § 1607.4(c) (1975)). The key phrase as to the employers' burden of proof is "significantly correlated." Under the EEOC guidelines this concept "ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance." 29 C.F.R. § 1607.5(c)(1) (1975). This means that a test must have a 95% probability of predicting job performance or it is not significantly correlated. Thus, the burden of proof for an employer has shifted dramatically from the simple *Griggs* "job related" formula to the technical, "significantly correlated" formula stated in *Albermarle Paper.*

[65] Smith v. Olin Chemical Corp., 555 F.2d 1283, 1287 (5th Cir. 1977) (en banc).

[66] *Id.* The court mentioned several articles and cases which reach the same conclusion. *E.g., id.* at 1287-88 (citing Dorcus v. Westvaco Corp., 345 F. Supp. 1173, 1174 (W.D. Va. 1972) (prospective employee for manual labor position denied employment upon discovery of bad knee)).

[67] 555 F.2d at 1288. The court relied exclusively on McDonnell Douglas Corp. v.

In a forceful dissent,[68] Judge Godbold reasoned that Olin's motion for summary judgment did not address Smith's claim of disparate impact, and therefore, the grant of summary judgment denied Smith the opportunity to establish a prima facie case of discrimination.[69] Noting that this denial was in direct contradiction to the proof requirements established in *Griggs*,[70] the dissent argued that Smith was entitled to a new hearing. Judge Godbold concluded that if Smith could establish a prima facie case, Olin would then be required to come forward with proof of business necessity.[71]

At first blush *Smith v. Olin Chemical Corp.*[72] offers a pragmatic approach to the problem of establishing a reasonable standard of proof for job relatedness. After *Albermarle Paper*[73] delineated the specific standards for proof of business necessity,[74] employers found it difficult, if not impossible, to sustain employment qualifications once a prima facie case of discriminatory effect had been established.[75] Because plaintiffs can establish such prima facie cases with relative ease,[76] one commentator has suggested that under Title VII there is a "gross disproportion in the burdens of proof" placed on the parties.[77] Under *Olin Chemical* certain employees are effectively spared running the gauntlet of the business necessity test since, in a limited context, business necessity is presumed as a matter of law.[78] Viewed in this light the decision can be seen as developing a partial solution to the problem of establishing a reasonable standard of proof by striking a fairer balance between the respective burdens of proof of plaintiff and defendant.

Nevertheless, even assuming such beneficial results, the decision is untenable for its erroneous construction of precedent. In attempting to justify its holding in *Olin Chemical*, the court of appeals relied exclusively on *McDonnell Douglas Corp. v. Green*,[79] where a black activist employee had been discharged after he had participated in an unlawful civil rights demonstration against the company. The Court held that his discharge did not violate Title VII since the employer had met his burden of proof by assigning the employee's illegal acts

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Green, 411 U.S. 792 (1973), and construed the case as holding that "there is a narrow class of job requirements for which no evidentiary showing is needed." 555 F.2d at 1286-87.

[68] 555 F.2d 1283, 1289-90 (Godbold, J., dissenting, joined by Judges Wisdom and Goldberg).

[69] *Id.* at 1289.

[70] *Id.*

[71] *Id.* at 1289-90. Judge Godbold questioned how the court could conclude that Olin's requirement was obviously job related based on a two word job description supplied by the firm. *Id.* at 1290.

[72] 555 F.2d 1283 (5th Cir. 1977) (en banc).

[73] See notes 58 through 64 *supra.*

[74] See note 64 *supra.*

[75] *See* Lerner, *supra* note 59, at 267.

[76] *Id.*

[77] *Id.* at 268.

[78] *Olin Chemical's* presumption applies when the qualification is manifestly related to the job for which it is used. 555 F.2d at 1288.

[79] 411 U.S. 792 (1973). See notes 49 through 56 *supra.*

directed against the company as the reason for his dismissal.[80] Significantly, the Court had stated in a footnote that "the issue of what may properly be used to test qualifications for employment is not present in this case."[81] Despite this explicit statement, the court of appeals in *Olin Chemical* held *McDonnell Douglas* to be applicable.[82] Although *Olin Chemical* quotes at length from *McDonnell Douglas*[83] in an effort to justify its interpretation of the case, examination of the full context of the quoted material[84] can produce the conclusion that the court of appeals emphasized only that portion which best comported with its decision.

But *Olin Chemical* fails for yet another broader and more basic reason. Since 1971 the Supreme Court has refused to carve out exceptions to the employer's heavy burden of proof in disproportionate impact cases. Indeed, it has progressively added weight to such burden.[85] Likewise, the Court has not employed vague terms such as "obvious" and "manifest" in delineating standards of job relatedness for proof of business necessity, but to the contrary, has clearly defined an objective standard.[86] In contrast, *Olin Chemical* sets out an exception to the disproportionate impact rule's burden of proof and establishes a subjective, "manifestly related," standard to trigger the exception.[87] Furthermore, in enunciating this test, the court of appeals did not describe the requirements which, if met, would allow an employer to forego providing proof of

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[80] 411 U.S. at 802-03. See note 49 *supra*.

[81] 411 U.S. at 802 n.14.

[82] 555 F.2d at 1287. The court stated: "While in a footnote, 411 U.S. at 802 n.14, the Court suggested an employee's 'qualifications' were not at issue in *McDonnell Douglas*, the direct comparison with *Griggs* in the text and the company-wide nature of the policy indicate the holding has significance beyond its particular facts." 555 F.2d at 1287.

[83] *Id.*

[84] The quotation in *Olin Chemical* begins with "does not seek," *id.*, which is just over six sentences into the paragraph in *McDonnell Douglas* from which the court quotes, 411 U.S. at 805-06. What the court of appeals chose not to quote in the preceding text is the Supreme Court's clear delineation of why the issues present in *McDonnell Douglas* are completely dissimilar from those present in *Griggs:*

> The court below appeared to rely on Griggs . . . . But Griggs differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired position. . . . Respondent, however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And petitioner does not seek . . . .

Id.

A further indicia of the failure to distinguish *Griggs* from *McDonnell Douglas* is the court of appeals' use of the term "job criterion," 555 F.2d 1287, synonymously with "qualifications." The Supreme Court used the term "criterion" in *McDonnell Douglas* only in reference to the company's policy of discharging those who participate in illegal activity against it, 411 U.S. at 804, while the terms "tests and qualifications" were used to describe the preemployment practices at issue in *Griggs*, 411 U.S. at 802 n.14.

[85] See text accompanying notes 40, 53, 56 & 64 *supra*.

[86] 422 U.S. 430-31. *See* note 64 *supra* (95% correlation).

[87] 555 F.2d at 1287-88.

business necessity.[88] At best, the court said in effect: we cannot define with precision when a job requirement is manifestly related to job performance, but we know one when we see it, and we see one now. The adoption of this type of subjective, case by case standard for Title VII purposes could be disastrous. Presumably, federal district judges would make an initial determination of this type on a motion for summary judgment by the employer. The chance that a uniform standard would be applied is slim. This lack of uniformity would be detrimental to both parties in the suit, employer and employee, since neither could be sure what a particular district judge will consider to be "obvious" until he has ruled on the specific point in question. These problems could prove especially acute for companies with operations that span the United States. Thus, the adoption of such a test would serve to vitiate one of the major thrusts of Title VII decisions—the development of objective criteria—not only as to the concept of discrimination, but also as to the process of determining if a given employment practice is tenable even though it operates to the disadvantage of minorities. In light of Title VII precedent, and for the sake of uniform application of the law, *Smith v. Olin Chemical Corp.* should not be followed.

Winthrop G. Gardner

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[88] *Id.* at 1288. The court stated: "In sum, without indicating at all what other physical requirements for various jobs would fall within the principle of this case, we hold that an employer does not have to justify . . . ." *Id.*

LIENS—PRIORITY UNDER U.C.C. SECTION 9-310—ARTISAN'S LIEN TAKES PRIORITY OVER PRIOR PERFECTED SECURITY INTEREST NOTWITHSTANDING LACK OF CONTINUOUS POSSESSION OF REPAIRED PROPERTY

Thorp Commercial Corporation filed a replevin action against Mississippi Road Supply (MRS) seeking recovery of a tractor. Thorp had leased the tractor to James Herrin[1] who had subsequently delivered it to MRS for repairs.[2] MRS returned the tractor to Herrin after he issued a promissory note to secure the repairs. Herrin later defaulted on the Thorp lease, and since he was also unable to pay for the repairs, he voluntarily returned the tractor to MRS. MRS contended that it had a valid artisan's lien[3] which took priority over Thorp's earlier perfected security interest.[4] Thorp responded that MRS could not claim priority since it had once given up possession of the tractor. The Circuit Court of the First Judicial District of Hinds County held MRS' artisan's lien superior. On appeal to an en banc Mississippi Supreme Court, *held*, affirmed. A person in possession of goods to which he has rendered necessary service maintains a lien superior to a prior perfected security interest notwithstanding that possession has not been continuous. *Thorp Commercial Corp. v. Mississippi Road Supply Co.*, 348 So. 2d 1016 (Miss. 1977) (en banc).

At common law an artisan[5] who repaired property or otherwise enhanced its value or life was given the right to retain possession of the property until he had been paid for his services.[6] This right, known as an artisan's lien, depended

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[1] Thorp filed financing statements with the Secretary of State and the Chancery Clerk of Covington County, Herrin's place of residence. This satisfied the filing requirements of MISS. CODE ANN. § 75-9-401 (1972), for the perfection of Thorp's security interest. Thorp Commercial Corp. v. Mississippi Rd. Supply Co., 348 So. 2d 1016, 1016-17 (Miss. 1977) (en banc).

[2] MRS repaired the tractor at Herrin's request. 348 So. 2d at 1017.

[3] A lien has been defined as the "right of one in possession of personalty to hold it . . . for the satisfaction of a claim due from the owner." 1 L. JONES, A TREATISE ON THE LAW OF LIENS § 3, at 5 (3d ed. 1914).

[4] 348 So. 2d at 1017. MRS based this contention on MISS. CODE ANN. § 75-9-310 (1972), which provides:

> When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such a person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

[5] An artisan is defined as "[o]ne [who is] skilled in some kind of mechanical craft or art; a skilled mechanic." BLACK'S LAW DICTIONARY 145 (4th rev. ed. 1968). Artisan's liens are also referred to as repairman's liens, garageman's liens, and mechanic's liens. It has been suggested, however, that use of the term mechanic's lien in reference to personal property is incorrect and should be used only when referring to work done on real property. Note, *Statutory and Common Law Repairman's Liens in Illinois Under Section 9-310 of The Uniform Commercial Code*, 8 LOY.-CHI. L.J. 390, 390 n.1 (1977). *See generally* Brown, *Mechanics' Liens: An Interpretation of Section 356 as Amended*, 37 MISS. L.J. 203 (1966).

[6] *See, e.g.*, Stewart v. Flowers, 44 Miss. (2 Morris) 513, 517-18 (1870) (recognizing the common law rule that one who adds value to goods by his labor and skill has a lien upon those goods for reasonable charges); Wilson v. Martin, 40 N.H. (3 Chandler) 88, 90-91

on the artisan's exclusive[7] and continuous[8] possession of the item. Consequently, once possession was voluntarily surrendered, a subsequent retaking would not revive the lien[9] unless relinquishment had been conditioned upon its preservation.[10] The artisan generally encountered no substantial problems unless his lien came into conflict with an earlier interest. Although questions of priority[11] were often decided in favor of an owner or prior lienor if he did not give his consent to or had no knowledge of the repairs,[12] many courts found an owner's implied consent to necessary repairs.[13]

Despite such liberal interpretations establishing the liens, artisans encountered problems because the lien was merely possessory; the artisan's sole relief

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(1860) (same); White v. Smith, 44 N.J.L. (15 Vroom) 105, 108 (1882). *See generally* R. BROWN, THE LAW OF PERSONAL PROPERTY § 107, at 505 (2d ed. 1955); 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 33.2, at 873 (1965).

[7] *E.g.*, Bell v. Dennis, 43 N.M. 350, 93 P.2d 1003, 1005 (1939); Fitzgerald v. Elliot, 162 Pa. 118, 29 A. 346, 347 (1894).

[8] *E.g.*, Lathrop Lumber Co. v. Fitts, 208 Ala. 334, 94 So. 354, 355 (1922); Alexander v. Mobile Auto Co., 200 Ala. 586, 76 So. 944, 945-46 (1917); Yellow Mfg. Acceptance Corp. v. Bristol, 193 Or. 24, 236 P.2d 939, 946-48 (1951).

[9] Barbre-Askew Fin., Inc. v. Thompson, 247 N.C. 143, 148, 100 S.E.2d 381, 385 (1957); Susenbrenner v. Mathews, 48 Wis. 250, 3 N.W. 599, 600 (1879).

[10] Yellow Mfg. Acceptance Corp. v. Bristol, 193 Or. 24, 236 P.2d 939, 946-47 (1951). It should be noted that even if the loss of possession were conditional and the necessary intent to preserve the lien were present, the lien would still be lost as against third persons. *Id. See generally* L. JONES, *supra* note 3, § 22, at 19-20.

[11] The following situation is an example of such a priority question: *A* sells *B* equipment but retains title to ensure payment of the purchase price. *B* takes the equipment to *C* for repairs. *C* is not paid and keeps possession of the property, claiming a common law lien. *B* later defaults on his payment to *A*. *A* and *C* both assert they are entitled to the equipment in order to satisfy their respective claims.

[12] *See, e.g.*, Ehrlich v. Chapple, 311 Ill. 467, 143 N.E. 61, 62 (1924) (chattel mortgage held superior to artisan's lien for repairs made on automobile without notice or consent of mortgagee); Small v. Robinson, 69 Me. (1 Hastins) 425, 427-28 (1879) (conditional seller of a hack held to have a superior claim to repairman because no consent was given to the repairs); Metropolitan Sec. Co. v. Orlow, 107 Ohio St. 583, 588-89, 140 N.E. 306, 308 (1923) (artisan's lien for repairs to an automobile held subordinate to chattel mortgage where mortgagee did not know of or consent to the repairs).

[13] *See, e.g.*, Watts v. Sweeney, 127 Ind. 116, 26 N.E. 680, 682 (1891) (chattel mortgage held subordinate to artisan's lien because machinery involved was entrusted to mortgagor for long periods of time and necessary repairs were presumably approved by the mortgagee through the acts of his agent, the mortgagor); Hammond v. Danielson, 126 Mass. (12 Lathrop) 294, 296 (1879) (lien for repairs to hack held to be superior to prior chattel mortgage since intention of the parties was that hack would be driven and kept in proper state of repair); Drummond Carriage Co. v. Mills, 54 Neb. 417, 74 N.W. 966, 969-70 (1898) (artisan's lien for repairs on buggy held superior to chattel mortgage since terms of mortgage gave mortgagor an implied authority to have repairs made). The reason for recognizing an implied consent was that courts often felt it only fair to give priority to the artisan since the repairs were for the betterment of the property and would increase its value for the mortgagee. Watts v. Sweeney, 26 N.E. at 682; Drummond Carriage Co. v. Mills, 74 N.W. at 969.

was to hold the property until payment was made.[14] To alleviate this situation, states enacted statutory liens, which for the first time provided means of enforcement for the artisan.[15] By 1880 Mississippi had followed suit.[16] The Mississippi Supreme Court construed this statutory lien liberally in favor of the artisan, incorporating the concept of an owner's implied consent to necessary repairs.[17] Most courts agree that the statutory possessory lien, like its common law ancestor, is based on possession and is waived when the lienholder voluntarily and unconditionally parts with possession;[18] a subsequent reacquisition of the property will not revive the lien.[19] Consequently, besides codifying the strictly

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[14] Fishback v. Foster, 23 Ariz. 206, 202 P. 806, 808 (1922); Burrough v. Ely, 54 W.Va. 118, 46 S.E. 371, 371 (1903); R. BROWN, *supra* note 6, § 119, at 588; G. GILMORE, *supra* note 6, § 33.2, at 873. No foreclosure or sale provisions were provided for fear of injury to commercial interests. R. BROWN, *supra* note 6, § 119, at 589-90. *See generally* Aldine Mfg. Co. v. Phillips, 118 Mich. 162, 76 N.W. 371, 372-74 (1898).

[15] R. BROWN, *supra* note 6, § 119, at 590. Some of these statutes expand the common law lien and go into great detail concerning the conditions of the lien and steps involved in foreclosure, *e.g.*, CAL. CIV. CODE § 3051 (West Supp. 1977); CONN. GEN. STAT. ANN. § 49-61 (West 1958) (amended 1976); DEL. CODE tit. 25, § 3901 (1974), while others are simply restatements of the common law lien that provide the lienor with means of enforcement either by sale of the goods or by court proceedings against the owner, *e.g.*, COLO. REV. STAT. § 38-20-106 (1973); MINN. STAT. ANN. § 514.18 (West 1947); TENN. CODE ANN. § 64-1401 (1955) (amended 1965). 2 G. GILMORE, *supra* note 6, § 33.2, at 874.

[16] MISS. CODE § 1383 (1880). Section 1383 is presently codified at MISS. CODE ANN. § 85-7-101 (1972), which provides:

> All carriages, buggies, wagons, plows, or any article constructed, manufactured or repaired for any person, and at his instance, shall be liable for the price of the labor and material employed in constructing, manufacturing, or repairing the same and the mechanic to whom the price of said labor and material may be due shall have the right to retain possession of such things so constructed, manufactured, or repaired until the price be paid; and if the same shall not be paid within thirty days, he may commence his suit in any court of competent jurisdiction, and, upon proof of the value of the labor and materials employed in such repairs, manufacture or construction, he shall be entitled to judgment against the party for whom such labor was done or materials furnished, with costs, as in other cases, and to a special order for the sale of the property retained in his possession for the payment thereof, with costs, and to an execution, as in other cases, for the residue of what remains unpaid after sale of the property.

The statute did not create a new lien for the artisan, but only codified the common law right and provided a means of enforcement. Broom & Son v. Dale & Sons, 109 Miss. 52, 60, 67 So. 659, 660 (1915).

[17] *See* DeVan Motor Co. v. Bailey, 177 Miss. 441, 448-49, 171 So. 342, 344 (1936); Moorhead Motor Co. v. H.D. Walker Auto Co., 133 Miss. 63, 72-73, 97 So. 486, 487 (1923); Broom & Son v. Dale & Sons, 109 Miss. 52, 63-64, 67 So. 659, 661-62 (1915); *cf.* Funchess v. Pennington, 205 Miss. 500, 512, 39 So. 2d 1, 1 (1949) (en banc) (burden of proving necessity of repairs placed on artisan).

[18] *E.g.*, Gould v. Hill, 43 Idaho 93, 291 P. 167, 171 (1926); Stein v. McAuley, 147 Iowa 630, 125 N.W. 336, 338 (1910); McMaster v. Merrick, 41 Mich. 505, 2 N.W. 895, 899 (1879); *cf.* Reich v. Triplett, 199 N.C. 678, 155 S.E. 573, 574-75 (1930) (lien is not lost if artisan is induced to part with possession by fraudulent representations).

[19] *E.g.*, Kirkham Corp. v. Owens, 62 Cal. App. 2d 193, 144 P.2d 405, 408-09 (1944);

possessory artisans' liens, several states also enacted a statutory lien for artisans not in possession of repaired property.[20] The Mississippi version of the nonpossessory lien[21] provides that the artisan retains his lien despite loss of possession, although enforcement is not by replevin action but by writ of seizure and sale.[22] The retention of such a lien is allowed where the property remains in the hands of the owner or one who derives title or possession from the owner, provided that notice of the unpaid indebtedness is given.[23] Furthermore, despite the clear

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Barbre-Askew Fin., Inc. v. Thompson, 247 N.C. 143, 148, 100 S.E.2d 381, 384 (1957). *But see* Gordon v. Sullivan, 188 F.2d 980, 981-82 (D.C. Cir. 1951). In *Gordon*, a garage keeper's lien was given priority despite the fact that the garage keeper had relinquished and later reacquired possession of the subject car. *Id.* at 982. The statute at issue provided, "Garagekeepers shall . . . have a lien for their charges for . . . repairs . . . of . . . motor vehicles, when such charges are incurred by an owner or conditional vendee of such motor vehicles, and may detain such motor vehicles at any time they may have lawful possession thereof . . . ." D.C. CODE § 38-201 (1940) (repealed 1952), *quoted in* Gordon v. Sullivan, 188 F.2d at 980 n.1.

[20] *E.g.*, ARK. STAT. ANN. § 51-409 (1947); KY. REV. STAT. § 376.270 (1962); N.J. STAT. ANN. § 2A:44-22 (West 1952). While some of these statutes simply provide that retention of possession is not required for maintaining the lien, *e.g.*, N.J. STAT. ANN. § 2A: 44-22 (West 1952), others require notice of the lien to be filed within a specified time, *e.g.*, ARK. STAT. ANN. § 51-409 (1947); KY. REV. STAT. § 376.270 (1962). *See* Lee, *Power of Possessor of Personal Property to Create Lien for Repairs and Storage Charges Superior to Existing Interests of Others*, 90 U. PA. L. REV. 910, 920 (1942).

[21] MISS. CODE ANN. § 85-7-105 (1972). The statute provides:

> If the lienholders mentioned in [section] 85-7-101 . . . part with possession of the property, they shall retain their liens while the property remains in the hands of the owner, or one deriving title or possession through him, with notice that the price of the labor and materials . . . was unpaid, and may enforce the same in like manner as is provided in sections 85-7-31 and 85-7-53.

Section 85-7-31 specifies the method by which property subject to a lien may be seized. The person having a lien must make an affidavit before any officer authorized to administer oaths in the county where the subject property is located. The lienholder must describe the property, set forth his claim, provide an itemized account of his demand, and give the names of those interested and who have a like claim in the property. A writ may then be issued directing seizure of the property and summoning interested persons named in the affidavit. *Id.* § 85-7-31. Section 85-7-53 provides for the sale of the property and states that the purchaser of such property shall acquire it free from all encumbrances save concurrent liens under §§ 85-7-1 to -265. *Id.* § 85-7-53.

[22] *Id.* § 85-7-105; *see* Central Motor Exch. v. Thompson, 236 So.2d 736, 737-38 (Miss. 1970) (mechanic who had parted with possession of truck on which repairs had been made prevented from recovering possession through replevin action). *Compare* Huntley v. Drummond, 226 Miss. 753, 757, 85 So. 2d 188, 189 (1956) (an artisan, after parting with possession of the subject property, "retains a lien to the extent that is allowed in cases of liens for purchase money of goods, and he may enforce the same in that manner") *with* Runnels v. Fairchild, 204 Miss. 287, 289-90, 37 So. 2d 312, 312-13 (1948) (action in replevin held not to be a proper remedy for enforcement of a statutory purchase money lien).

[23] *See* Billups v. Becker's Welding & Mach. Co., 186 Miss. 41, 52, 189 So. 526, 529-30 (1936) (artisan's lien held superior where subsequent lienor pleaded but did not prove lack of notice of repair charges); *cf.* Watson v. Broadhead, 203 Miss. 142, 144-46, 33 So. 2d 302, 302-03 (1948) (assignee of a prior deed of trust on repaired property held not to be "one

contradiction to common law holdings, a repairman's *non*possessory lien has been held in priority over a conditional sales contract when the repairs involved are necessary for the property's preservation and operation or to prevent the property's deterioration.[24] Both enactments in favor of artisans, therefore, hold the artisan in priority over owners or prior lienors.

Against this background of common law and statutory, possessory and nonpossessory artisan's liens, the Uniform Commercial Code[25] speaks directly to the issue of priority between an artisan's lien and a prior security interest.[26] U.C.C. section 9-310[27] provides that a lien created "by statute or rule of law"[28] will be given priority in all cases where services and materials are furnished in the ordinary course of business and where the goods are in the lienor's possession.[29] The sole exception occurs when the statute creating the lien expressly subordi-

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deriving title . . . through [the owner]" and, consequently, notice was not at issue; artisan's lien held superior). *See generally* Stratton, *Writ of Seizure*, 24 Miss. L.J. 138, 144-54 (1952).

The court in *Billups* stated that priority would depend upon actual notice or knowledge of the artisan's lien, thus indicating that formal notice is not a requirement. Billups v. Becker's Welding & Mach. Co., 186 Miss. at 50-51, 189 So. at 529.

[24] *See* Commercial Sec. Co. v. Kriner, 53 So. 2d 92, 93 (Miss. 1951) (mechanic's nonpossessory lien held in priority over retained title contract since repairs made upon the subject automobile were reasonably necessary). Thus, when a priority question arises, the requirement that the repairs be necessary is applicable to both the nonpossessory lien and the statutory possessory lien. *See generally* Blackard v. City Nat'l Bank, 142 F. Supp. 753, 758 (D. Alas. 1956) (discussing the necessity of repairs requirement for the subordination of the mortgagee's rights to the repairman's rights); Doss Motor Co. v. Kemp Mach. Serv., 213 Miss. 244, 250, 56 So. 2d 707, 708-09 (1952) (repairman's lien held superior to retained title lien since repairs were "reasonably necessary"). See notes 13 & 17 *supra*.

[25] Mississippi enacted the Uniform Commercial Code in 1966, to take effect March 31, 1968. Uniform Commercial Code Act, 1966 Miss. Laws. ch. 316 (codified at Miss. Code Ann. § 75-1-101 to -10-104 (1972)).

[26] Miss. Code Ann. § 75-9-310 (1972). See note 4 *supra*. It should be noted that Chapter 9 "does not apply to statutory liens except as provided in Section 9-310 [§ 75-9-310]." Miss. Code Ann. § 75-9-102(2) (1972). This limitation is also stated at *id.* § 75-9-104(c), which provides in pertinent part: "This chapter does not apply . . . to a lien given by statute or other rule of law for services or materials except as provided in Section 9-310 [§ 75-9-310] on priority of such liens . . . ."

For discussions of the interaction between statutory liens and U.C.C. § 9-310, see Miller, *Liens Created by Operations of Law: A Look at Section 9-310 of the Uniform Commercial Code*, 76 Com. L.J. 221 (1971); Note, *The Artisan Lienholder vs. the Perfected Security Interests*, 18 Clev.-Mar. L. Rev. 208 (1969); Note, *Priorities Between Article Nine Security Interests and Statutory Liens in Iowa*, 23 Drake L. Rev. 169 (1973); Comment, *Priority Between Security Interests and Liens Arising by Operation of Law in Oregon*, 12 Williamette L.J. 173 (1975); Comment, *Nonconsensual Liens Under Article 9*, 76 Yale L.J. 1649 (1967).

[27] U.C.C. § 9-310 (codified at Miss. Code Ann. § 75-9-310 (1972)).

[28] *Id.*

[29] *Id.; see, e.g.*, Manufacturer's Acceptance Corp. v. Gibson, 220 Tenn. 654, 658-59, 422 S.W.2d 435, 436-37 (1967) (lien of artisan in possession held superior to prior security interest under the U.C.C.). *See generally* R. Anderson, Uniform Commercial Code § 9:310:3 (2d ed. 1971).

nates it to other interests.[30]

Because of the requirement of possession, it is not entirely clear how section

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[30] U.C.C. § 9-310 (codified at MISS. CODE ANN. § 75-9-310 (1972)); Manufacturer's Acceptance Corp. v. Gibson, 220 Tenn. 654, 659, 422 S.W.2d 435, 437 (1967); 2 G. GILMORE, *supra* note 6, § 33.5, at 886-87; *see* Corbin Deposit Bank v. King, 384 S.W.2d 302, 304 (Ky. 1964) (security interest held subordinate to artisan's lien); Gulf Coast State Bank v. Nelms, 525 S.W.2d 866, 870 (Tex. 1975) (Texas artisan's lien statute does not expressly provide for subordination to prior perfected security interest, therefore repairman's possessory lien takes priority). The comment to § 9-310 specifies: "If the statute creating the lien is silent, even though it has been construed by decision to make the lien subordinate to the security interest, this Section provides a rule of interpretation that the lien shall take priority over the security interest." U.C.C. § 9-310, comment 2 (1972 version).

Varied results have been reached in the states that have interpreted § 9-310, depending upon the wording of the particular statute under which the artisan's lien is claimed. Other than the nonpossessory statutes, see notes 20 through 24 and accompanying text *supra*, the types of artisan's liens may be divided into two categories: (1) those that expressly subordinate the lien to other interests; (2) those that are silent as to priority. Those liens that fall into the first category are not affected by § 9-310 since they are expressly subordinated. In Bond v. Dudley, 244 Ark. 568, 426 S.W.2d 780 (1968), the Supreme Court of Arkansas held that the lien of a repairman who had done work on an automobile was subordinate to the lien of a seller who had retained title to the automobile. ARK. STAT. ANN. § 51-412 (1947) provided that the artisan's lien was to be subject to the lien of the vendor of automobiles. 426 S.W.2d at 781-82. The court concluded that this was the type of statute intended to be outside the general priority of section 9-310. *Id.* Similar reasoning has been expressed in a number of other states which have subordinated an artisan's lien to a prior perfected security interest. *See, e.g.*, Decker v. Aurora Motors, Inc., 409 P.2d 603, 605 (Alaska 1966) (repairman's lien statute, when read in conjunction with motor vehicle statute, expressly subordinates a repairman's lien to earlier recorded interest); Pennington v. Alexander, 103 Ill. App. 2d 145, 242 N.E.2d 788, 790 (Ct. App. 1968) (statutory lien for repairs expressly subordinated to a previously recorded security interest); Municipal Equip. Co. v. Butch & Son Deep Rock, 185 N.W.2d 756, 758 (Iowa 1971) (artisan's lien held inferior because lien statute expressly subordinates the lien unless notice is given and written consent is obtained from all lienholders of record); Fruehauf Corp. v. Huntington Moving & Storage, Inc., 217 S.E.2d 907, 912 (W. Va. 1975) (repairman's lien statute when read together with statutes establishing the rights of lienors in property subject to other claims, expressly subordinates a repairman's lien to a prior perfected security interest); *cf.* Bryce Hosp. Credit Union, Inc. v. Warrior Dodge, Inc., 50 Ala. App. 15, 276 So. 2d 602, 606-07 (Civ. App. 1973) (an artisan's lien is statutorily subordinated to prior security interest if no consent by the secured party is given).

Most courts, however, have concluded that those liens falling into the second category will have priority so long as the artisan retains possession since the statute does not expressly subordinate the lien. Commerce Acceptance, Inc. v. Press, 428 P.2d 213, 215 (Okla. 1967); *accord,* Earthmovers, Inc. v. Clarence L. Boyd Co., 554 P.2d 877, 878-79 (Okla. Ct. App. 1976) (holding that since an artisan's lien takes priority over a creditor's previously perfected security interest, the purchaser at a nonjudicial lien foreclosure obtained title free and clear of security interest). Many other states in their interpretation of section 9-310 have followed this example, with the result occasionally effecting a reversal of prior case law which had subordinated the artisan's lien. *E.g.*, Gables Lincoln-Mercury, Inc. v. First Bank & Trust Co., 219 So. 2d 90, 92-93 (Fla. Dist. Ct. App. 1969); Charlie Edison's Paint & Body Shop, Inc. v. Commercial Credit Plan, Inc., 146 Ind. App.

9-310 affects nonpossessory liens. One interpretation provides that such liens are totally outside the scope of the section and that priority is governed by previous statute and case law.[31] According to this interpretation, section 9-310 does not affect pre-Code nonpossessory lien priority. A different interpretation, which comes from a more literal construction of the possession requirement, holds nonpossessory liens inferior to prior secured interests in all instances despite contrary pre-Code statutory and case law.[32] While these interpretations differ in their approach to subordination of nonpossessory liens, both agree that priority cannot be claimed by a nonpossessory lienholder through section 9-310.

In sum, the U.C.C. does not establish an artisan's lien but relies on those liens established by other statutory or decisional law. An example of the incorporation of prior law into section 9-310 is *GMAC v. Colwell Diesel Service & Garage, Inc.*[33] The Maine Supreme Court granted priority to a repairman notwithstanding that a prior lienor had not consented to the repairs.[34] The court reasoned that to require an express consent[35] would deprive the section of any meaningful effect since advance consent would rarely be given.[36]

209, 253 N.E.2d 717, 721 (Ct. App. 1969); Corbin Deposit Bank v. King, 384 S.W.2d 302, 304 (Ky. 1964); Gulf Coast State Bank v. Nelms, 525 S.W.2d 866, 870 (Tex. 1975). *But cf.* Commonwealth Loan Co. v. Berry, 2 Ohio St. 2d 169, 170, 207 N.E.2d 545, 546 (1965) (U.C.C. held not to alter prior rules in Ohio concerning motor vehicles; lien noted on certificate of title prevails over other liens).

Under § 9-310, the artisan must provide the services and materials for the subject property in the ordinary course of business. Such services must be undertaken in good faith and without knowledge of any term of a security interest that would be breached by the expectation of a lien. *See* U.C.C. § 1-201(a) (buyer in ordinary course of business must act in good faith and have no knowledge that the sale violates another's ownership rights or security interest); *id.* § 1-203 ("Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."). *See generally* Miller, *supra* note 26, at 229; Note, *Priorities Between Article Nine Security Interests and Statutory Liens in Iowa*, 23 DRAKE L. REV. 169, 172 (1973).

[31] Leger Mill Co. v. Kleen-Leen, Inc., 563 P.2d 132, 136 (Okla. 1977). "[T]he Uniform Commercial Code is totally inapplicable to non-possessory liens and . . . the question of their priority in relation to secured interests must be determined by existing statutes and pre-code case law." *Id.* This interpretation has been adopted by several states in their comments to § 9-310, and they agree that the section is not applicable to statutory nonpossessory liens after possession is given up. ILL. ANN. STAT. ch. 26, § 9-310 (Smith-Hurd 1963) (Code Comment); N.J. STAT. ANN. § 12A: 9-310 (West 1962) (Study Comment); WASH. REV. CODE ANN. § 62A.9-310 (1966) (Comment).

[32] Note, *supra* note 30 at 175; *see, e.g.*, Forrest Cate Ford, Inc. v. Fryar, 62 Tenn. App. 572, 465 S.W.2d 882, 884 (Ct. App. 1970) (repairman's nonpossessory statutory lien for repairs to a vehicle held subordinate to a prior perfected security interest); Balzar Mach. Co. v. Klineline Sand & Gravel Co., 533 P.2d 321, 324 (Or. 1975) (en banc) (perfected security interest held superior to a nonpossessory artisan's lien even though state's nonpossessory lien statute would have been given priority before enactment of § 9-310).

[33] 302 A.2d 595 (Me. 1973).

[34] *Id.* at 601; *accord*, Manufacturer's Acceptance Corp. v. Gibson, 220 Tenn. 654, 659, 422 S.W.2d 435, 437 (1967).

[35] See note 12 and accompanying text *supra*.

[36] 302 A.2d at 599-600.

In the instant case, the court declared that Mississippi's version of section 9-310 gives an artisan priority for goods in his possession.[37] The court recognized that a new statute, absent a contrary legislative intent, should not constitute a reversal of well-established principles of law and equity. Consequently, section 9-310 should be interpreted in light of the preexisting lien statutes[38] and case law,[39] which have given the artisan a claim superior to prior security interests.[40] The court concluded that because there was no change in the status of the parties between the time of MRS' relinquishment and reacquisition of the tractor, and since Thorp was not prejudiced by such restoration, MRS maintained a superior lien under section 9-310, despite its lack of continuous possession.[41]

Chief Justice Patterson dissented, noting that the legislature's adoption of the U.C.C. indicated its intention that priorities were to be uniformly enforced.[42] He disagreed with the court's decision because it allowed the debtor to decide which lien would have priority by either retaining possession of repaired property or returning it to the artisan.[43] Moreover, the Chief Justice argued, a uniform system of priorities requires that possession be continuous. Even where possession is voluntarily relinquished, the artisan still may resort to other legal remedies that will provide him with adequate protection.[44]

The common law lien can therefore be used to establish priority for the artisan even though he may have failed to meet the statutory requirements. Nickell v. Lambrecht, 29 Mich. App. 191, 185 N.W.2d 155, 158 (Ct. App. 1970); 2 G. GILMORE, *supra* note 6, § 33.3, at 875. It should be noted, however, that the common law lien's priority under § 9-310 will be lost if the repairman fails to retain possession of the subject goods. *See, e.g.*, Ford Motor Credit Co. v. Howell Bros. Truck & Auto Repair, Inc., 57 Ala. App. 46, 325 So. 2d 562, 564-65 (Civ. App. 1975) (reacquisition of the subject property will not revive a common law lien).

[37] Thorp Commercial Corp. v. Mississippi Rd. Supply Co., 348 So. 2d 1016, 1017-18 (Miss. 1977) (en banc).

[38] *See* MISS. CODE ANN. §§ 85-7-101, -105 (1972) (artisan's possessory and nonpossessory liens).

[39] *See, e.g.*, Commercial Sec. Co. v. Kriner, 53 So. 2d 92, 93 (Miss. 1951) (artisan's lien held superior to prior security interest); Billups v. Becker's Welding & Machine Co., 186 Miss. 41, 50, 189 So. 526, 529 (1939) (same); DeVan Motor Co. v. Bailey, 177 Miss. 441, 449, 171 So. 342, 344 (1936) (same); Broom & Son v. Dale & Sons, 109 Miss. 52, 63-64, 67 So. 659, 662 (1915) (same).

[40] 348 So. 2d at 1017-18.

[41] *Id.* at 1018.

[42] *Id.* at 1018-19 (Patterson, C.J., dissenting).

[43] *Id.* at 1018.

[44] *Id.* at 1019. Chief Justice Patterson noted four possible remedies for the repairman. First, the repairman can retain possession and be completely protected by statute. Second, he can take a security interest in parts used and give notice to the prior creditor and be partially protected under MISS. CODE ANN. §§ 75-9-107, -314 (1972). Third, he can obtain consent of the secured party before making repairs. Fourth, as a minimum, the repairman is entitled to the priority of a judgment debtor, even upon relinquishment. 348 So. 2d at 1019. Thus, Chief Justice Patterson apparently suggests that when possession is relinquished, the nonpossessory liens which have been given priority in the past no longer will be held superior to a security interest. *See id.* This view that § 9-310 denies priority

Thorp Commercial Corp. v. Mississippi Road Supply Co. represents a distinct victory for the artisan under the U.C.C., one certainly not unintended by the drafters.[45] The issue revolves around the term "possession" as used in section 9-310. The court is certainly well within the limits of reason in holding that possession is used as an absolute—that possession after relinquishment equates to original possession. This view is strengthened in light of Mississippi's prior statutory law maintaining a lien in the artisan out of possession, and interpretations which hold that lien in priority.[46] The dissent, on the other hand, is equally well reasoned in its argument to the contrary. The evenness of the question is, of course, reflected in the fact that the lower decision was affirmed by an evenly divided court.[47] Nevertheless, both sides are subject to some criticism. The court's opinion was based on the fact that the secured party's position was not prejudiced during the time the artisan was out of possession. Consequently, a pertinent question might be whether the decision turns on lack of increased prejudice to the secured party or whether the artisan's lien always remains valid after reacquisition of the repaired property. The dissent is also due its share of criticism.[48] The reliance on a lack of uniformity created by the decision stems from the dissent's belief that the debtor is now the master of the priority claims: whomever he returns possession to is the winner of the priority dispute. First of all, how often might the situation arise in which knowledgeable creditors in this exact situation are able to convince the debtor to deliver possession to them? And even when they can, do they not have a valid claim on the property? Finally, despite the dissent's contention, awarding priority to the artisan in possession is a concrete rule that will lead to uniformity of application. Possession is, after all, an ascertainable condition and easily determined.

The more interesting question, as is often the case, has yet to be answered—what of the nonpossessory lien after the enactment of section 9-310.[49] The court's opinion did not touch on the issue but the dissent implies that the

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in all cases where possession is relinquished is discussed in note 32 and accompanying text *supra*.

[45] "[T]he Code adopts the policy of subordinating security interests to service liens." 2 G. GILMORE, *supra* note 6, § 33.5, at 886.

[46] See note 24 and accompanying text *supra*.

[47] The decision has already been tested with the interesting result that a dissenting justice in *Thorp Commercial Co.*, Justice Broom, applied that case as controlling, reaching a similar conclusion. ITT Indus. Credit Co. v. Robinson, 350 So. 2d 48, 52 (Miss. 1977).

[48] The dissent relies on the weight of "modern decision," citing Forrest Cate Ford, Inc. v. Fryer, 62 Tenn. App. 572, 465 S.W.2d 882 (Ct. App. 1970). An analysis of that decision reveals, however, that the facts concerned a nonpossessory lien. 465 S.W.2d at 883. The *Forrest Cate* court's conclusion that "the plain import of [§ 9-310] is the repairman must retain possession of the vehicle repaired in order to maintain *priority* of his statutory [nonpossessory] lien . . . ." *Id.* at 884. This conclusion is arguably dictum if construed to apply to reacquisition of possession.

[49] 2 G. GILMORE, *supra* note 6, § 33.5, at 888. With regard to unperfected security interests, nonpossessory liens would still maintain priority. *Compare* Commercial Sec. Co. v. Kriner, 53 So. 2d 92, 93 (Miss. 1951) (artisan's nonpossessory lien is superior to prior security interest) *with* MISS. CODE ANN. § 75-9-301 (1972) (unperfected security interest subordinate to interests given priority by other sections, *e.g.*, § 9-310).

court would never allow priority to an artisan out of possession. This appears to be a proper view, although, as Gilmore suggests, not a necessary one.[50] Such a holding would overrule existing case law which now holds nonpossessory liens in priority.[51] This would present something of an anomaly, for it is the existence of the nonpossessory lien which lends credence to the concept of priority reviving in an artisan regaining possession.[52] Yet, strict construction of the possession requirement of section 9-310 would work as a diminution of the priority previously held by the nonpossessory lienholder. Regardless of the outcome of this question, one hopes that if strict construction prevails, contrary case law holding nonpossessory liens in priority will be expressly overruled. Failure on this point would certainly bring about the dissent's asserted lack of uniformity.

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[50] The hard question is whether the possessory language in § 9-310 should be taken to reverse priorities (and subordinate the lien) where the lien statute (expressly or by judicial construction) gives priority to the filing lienor without possession. That may be the most obvious construction of § 9-310, but the unexplained appearance of the possessory language in the 1956 draft does not lead inevitably to the conclusion that the draftsmen deliberately aimed at subordinating nonpossessory liens even when the liens, quite apart from Article 9, already enjoyed a statutory or judicial priority. In the absence of judicial construction, the question must be considered open.

2 G. GILMORE, *supra* note 6, § 33.5, at 888.

[51] *See* Commercial Sec. Co. v. Kriner, 53 So. 2d 92, 93 (Miss. 1951) (artisan's nonpossessory lien is superior to prior security interest).

[52] The statutory scheme in Mississippi, MISS. CODE ANN. §§ 85-7-101, -105 (1972), provides for the existence of an artisan's lien despite possession or lack thereof. That the lien continues after loss of possession leads to a conclusion that reacquisition of possession reinstates priority. This view contrasts with the effect of the common law which would hold the lien nonexistent after loss of possession. *E.g.*, Ford Motor Credit Co. v. Howell Bros. Truck & Auto Repair, Inc., 57 Ala. App. 46, 325 So. 2d 562, 564-65 (Civ. App. 1975).

BOOK REVIEW

AN ATTORNEY'S GUIDE TO MALPRACTICE LIABILITY

By Duke Nordlinger Stern
Charlottesville, Virginia: The Mitchie Company, 1977.
Pp. 649 $35.00

*William A. Mossberg**

The assignment to review *An Attorney's Guide to Malpractice Liability* presents a unique experience. It is the approximate equivalent of being asked to review a volume from the national reporters. The book is made up of eleven chapters, each consisting of reprints from prior publications dating from 1959 to 1975 with no meaningful commentary or discussion to tie these various offerings together or to explain either their significance or their present applicability. Consequently, the book is both excellent and at the same time disappointing, depending on the purpose for which it is read. The reprinted articles are complete with footnotes and citations, and each chapter has a bibliography of articles and case citations organized by jurisdiction. To the researcher or historian, the book would be, at the very least, a most convenient research tool.

The book begins with a most interesting review of the academic aspects of attorneys' liability, including an excellent article commenting on what most courts and lawyers tend to overlook in today's climate of no-fault and strict liability, the historical notion of proceeding from the determination of duty to the standard of care required by that duty and then a comparison of the conduct complained of to that standard.[1] Unfortunately, in all too many cases coming before the courts today, both the bench and the bar overlook these threshold concepts and proceed from the assumption that a result less than that desired by the client must be due to some fault or failure on the part of the attorney.

Next, some commentary is offered on what is captioned "The Current Malpractice Problem." The reprints in this section include a 1973 comment from the *Yale Law Journal*[2] describing some survey results and a complaint by the comment author based on his inability to obtain from the insurance industry those statistics which, in his mind, should have been available. Two other surveys are reported, one from a 1974 edition of the *Virginia Bar News*[3] and another from a 1972 *Journal of the Missouri Bar*,[4] in addition to a 1966 reprint from *Law*

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[1] Gillen, *Legal Malpractice*, 12 WASHBURN L.J. 281 (1973), reprinted at 6-10.

[2] Comment, *Improving Information on Legal Malpractice*, 82 YALE L.J. 590 (1973), reprinted at 25-50.

[3] Stern, *The Virginia Attorney Malpractice Experience*, 22 VA. B. NEWS 11 (No. 5, 1974), reprinted at 53-59.

[4] Rottman & Stern, *The Risk of Attorney Professional Liability*, 28 J. MO. B. 127 (1972), reprinted at 60-65.

Office Economics and Management[5] which is very brief and clearly out of date.

The most important succeeding section is captioned "Negligence: Errors and Omissions in General." It includes a 1963 *Columbia Law Review* comment[6] which is excellent as an academic exercise, but obviously badly outdated, and an excerpt from a 1973 *Tulsa Law Journal* comment[7] which purports in three and one-half pages to discuss eight separate subjects. Likewise, the fifth section, titled "Malpractice in the Litigation Process," contains a very specific 1967 *Valpariso University Law Review* comment[8] on an insignificant area and a 1969 *Texas Law Review* article[9] which is not on point since it deals not with attorneys' liability but with the matter of sanctions. Problems continue into the next section, "Additional Causes of Liability: Intentional Malpractice, Misapplication of Clients' Funds and Attorney-Client Transactions," consisting of one reprint from the *Cleveland State Law Review*[10] dealing with the matter of conflicts. The article treats the subject in an academic style rather than in terms of the real evil in conflict situations insofar as the attorney's liability is concerned, that in a conflict situation the attorney will be charged with full knowledge of both sides whether he has it or not. While the chapter's caption includes misapplication of funds, there is no treatment of the subject.

Following "The Special Case of Securities Law Practice," "The Special Case of the Attorney-Director," and a reprint from a Practicing Law Institute handbook[11] comparing presently outdated attorneys' professional liability policies, Mr. Stern includes a potpourri of "Dimensions of Legal Malpractice Exposure and Risk Prevention." This consists of eight articles, three of which are supplementary clippings from articles previously appearing in the book and the balance being some rather trite commentary from various sources. The last section of the book, "The Client's Cause of Action, Proof and Damages," contains additional pages from the 1963 *Columbia Law Review* article used earlier,[12] a 1972 item from the *Cleveland State Law Review*[13] citing cases from the Forties, Fifties and Sixties, and a one-page comment from the *Hastings Law Journal.*[14]

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[5] Seybold, *Attorneys' Professional Liability Claims,* 7 L. OFF. ECON. & MANAGEMENT 57 (1966), reprinted at 51-52.

[6] Comment, *Attorney Malpractice,* 63 COLUM. L. REV. 1292 (1963), reprinted at 118-34.

[7] Comment, *The State of Legal Malpractice in Oklahoma,* 9 TULSA L.J. 129 (1973), reprinted at 138-41.

[8] Comment, *Attorney's Negligence: The Belated Appeal,* 2 VAL. U. L. REV. 141 (1967), reprinted at 155-74.

[9] Wolf, *Attorney's Negligent Failure to Comply with Procedural Deadlines and Court Calendar Orders—Sanctions,* 47 TEX. L. REV. 1198 (1969), reprinted at 175-85.

[10] Nachbar, *Legal Malpractice: Improper Representation of Conflicting Interests,* 21 CLEV. ST. L. REV. 58 (1972), reprinted at 197-208.

[11] Johnson & Stern, *Significant Provisions in a Professional Liability Policy,* PROFESSIONAL LIABILITY INSURANCE FOR LAWYERS AND ACCOUNTANTS HANDBOOK 9-55. (Practicing Law Institute, 1976), reprinted at 380-415.

[12] Comment, *Attorney Malpractice,* 63 COLUM. L. REV. 1292 (1963), reprinted at 491-99.

[13] Joseph, *Commencement of Statute of Limitations for Malpractice of an Attorney,* 21 CLEV. ST. L. REV. 49 (1972), reprinted at 500-12.

[14] Comment, 24 HASTINGS L.J. 795 (1973), reprinted at 513-14.

Articles such as the 1973 *Yale Law Journal* reprint[15] in both Sections Two and Ten are typical of the sort of exercise engaged in by those who choose to attempt a statistical analysis of the so-called "lawyers malpractice problem." Their method has been to select, by some system never described, those factors which in their opinions are material considerations in identifying malpractice problems and their sources. Initial investigation of the situation often includes inquiry of professional liability insurance carriers, but unfortunately, the inquiry has generally gone to those persons within the insurance industry least qualified to comment on the claim situation. The result is that when the investigative stage for the collection of data for statistical analysis is reached, seldom, if ever, is the focus on those matters which have genuine significance in an assessment of the problem. For example, commentators are regularly told by insurance company spokesmen that time limitation problems, such as those created by statutes of limitation, produce the greatest volume of claims. This is already well established by statistical data. The researchers then typically ask the insurers for a variety of particulars, such as the size of the law firms involved, their locations, the age and experience of the practitioners within the firms, their legal education, marital status and anything else they can think of. The researchers' purpose is a noble one. They seek to identify the precise circumstances producing claim situations hopefully to the end that they might report, for instance, that statutes of limitations are overlooked most commonly by young lawyers operating as sole practitioners in rural towns and that the errors occur primarily on Mondays. Anyone in the insurance industry with substantial experience handling claims of this type knows that these errors occur in large firms as well as small, in urban areas as well as rural, and in files handled by the most prestigious senior partners as well as those assigned to neophytes, and that firms with the most exotic docket control systems have their errors just as practitioners who have no system at all. Similarly, the researcher making this type of inquiry is commonly advised by the carrier that the requested information is not available. This is true because the accumulation of data is an expensive process and there is no reasonable basis to assume that the data, having been collected, will lead to anything constructive. The researchers typically take the position that the insurance carriers are being either evasive or untruthful, which is simply not the situation. If researchers would focus on the real reasons why lawyers today are sued more often and for larger sums than ever before, they would quickly conclude that they are dealing with a social and economic phenomenon rather than a mechanical problem which will be solved by identifying the fact that Friday afternoons and Monday mornings are the times when lawyers are more error prone.

If a productive inquiry into the cause of high premiums for professional liability coverage and a drying up of the market for such coverage is the object of the researcher, he would need only examine and evaluate the impact of vicious and often factually inaccurate pejorations, such as the American Trial Lawyers Association president's attack on the defense bar generally and the insurance industry in particular.[16] Indeed, lawyers can hardly expect that, when

[15] Comment, 82 YALE L.J. 590 (1973), reprinted at 25-50 and 419-38.

[16] *See, e.g., President's Page,* TRIAL, March 1978, at 4.

they have worked so hard to educate the public to the proposition that every injury or loss necessarily deserves compensation from some source, they themselves should not be the subjects of those same attitudes they so carefully and aggressively generate against other professionals, manufacturers, and property owners.The chapter on the "Attorney-Director" deserves further specific comment. The book contains well-written conflicting positions. The proponent argues from the posture that the attorney, because of his education and experience, is best qualified for this role. The opponent points to the conflict problems and increased liability exposure. It should also be kept in mind, however, that the liability of the attorney-director creates difficult problems in determining the applicability of insurance. Many current lawyers' professional policies contain a dual capacity exclusion. In *BarChris,*[17] the court took a position still followed, that once liability is determined, it is unnecessary to go further and identify the capacity in which that liability has been incurred. The result is that there may be no coverage available at all or, at the very best, there will be a dispute between the professional liability insurer and the director and officer insurer which will impede the orderly disposition of the claim or suit. If the decision of the attorney is to accept a board position, he should do so only after assurance that adequate director and officer insurance coverage is provided. It is unfortunate that the author saw fit to disassociate himself from this subject in this work. While the selection of articles gives an excellent historical review, they stop short of giving a fair view of where we are today. This is our time of decision, and a discussion of the questions that require answers is worthy of attention.

Were I to categorize "attorney malpractice," the most important and necessary distinctions would be litigation versus nonlitigation, privity versus nonprivity, and mechanical failures versus judgment errors. When case law dealing with one of these situations is used as authority in another, a gross perversion of the holding occurs. Unfortunately, in most malpractice cases, neither the judge nor counsel has had any significant exposure to the subject. Consequently, the entire spectrum of attorney error or omission is viewed as a single, limited specialty area. In reality, however, there are several quite distinct areas within the general subject of "legal malpractice," each requiring separate analysis. For example, a strict liability standard may well be appropriate in the area of mechanical failure, such as missing a routine time limitation, but the tendency has been to carry this standard over into nonmechnical areas and thus to equate an undesired or unfavorable outcome with malpractice.

Despite the appearance of following the medical pattern, the matter of lawyers' liability is still in a developmental stage and the law is far from stable. Consequently, reliance on case law, even if only two or three years old, is misleading and dangerous. At best, cases are helpful in identifying trends, not in determining what will be done in a pending matter. If a trend were to be observed, however, it is toward the finding of liability. The privity rule, for example, continues to be eroded. Statutes of limitation, while applied, are being rendered ineffective by courts' finding more and more reasons for their tolling.

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[17] Escott v. BarChris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968).

The recent United States Supreme Court decisions[18] in the securities field are encouraging for the lawyer-defendant, but have application only in that specialized area. Moreover, the attitude expressed in these cases has not infected most state courts and is being avoided by the semantic juggling of some federal district judges. Yet, in any case, the lessons of *Blue Chip*,[19] *Hochfelder*[20] and the other limiting Supreme Court decisions should not be read for more than they say: The federal securities laws have been abused by plaintiffs. The Court has made clear that this pattern will not be expanded further. State remedies, though not as procedurally appealing to the plaintiff, are still alive and well. Indeed, some state Blue Sky laws go beyond the federal laws in their anti-fraud and disclosure requirements and further authorize the enforcement agency to pursue damage cases on behalf of investors.

The social issue which must soon be faced is the question of who shall bear risk of loss from legal services that fail to deliver the full expectation of those affected. Presently, the attitude most often found on the bench is that the disappointed client or third party affected by legal services is entitled to satisfaction. The money to do this comes from insurance which makes possible an award without anyone actually facing the consequences of that award. The contest is not between the plaintiff and defendant, but rather between plaintiff and some nameless, faceless and seemingly inexhaustible fund which is looked on as having no purpose other than to satisfy whatever award is made. In this setting, the concept of risk transfer disappears. The trial ceases to be a determination of who, between the litigants, shall bear the risk of the loss from the less than expected result of the lawyer's efforts. For this reason, case analysis is of limited help in evaluating a presently pending situation. While employing the language of an adversary proceeding governed by law, the intellectual exercise employed by the courts is more and more often one of finding some legal authority which will produce a result consistent with an attitude of entitlement.

Only a few years ago, the typical lawyer's claim presented to the insurer for adjustment or defense involved simply the acts or omissions of the attorney. The factual basis of the claim most commonly involved a missed time limitation, with errors of a mechanical nature in title search close behind. Claims seldom turned on the election of one course of action over another, and the question of client intervention in the process was rarely seen. Today, the attorney's usually unsuccessful attempt to accommodate the client's needs or desires is frequently the subject of claims. A common situation is that of a distressed client whose business is failing, rendering a merger or additional financing a necessary alternative to disaster. The solution pursued is often of questionable legality but is chosen out of desperation and for lack of a better alternative. The attorney has, at least by his story, cautioned the client concerning possible problems with the course of action but is unable to document his warning.

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[18] Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (scienter required for rule 10b-5 cause of action); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (affirming *Birnbaum* rule that 10b-5 plaintiff must be either purchaser or seller of securities).

[19] 421 U.S. 723 (1975).

[20] 425 U.S. 185 (1976).

When, in this setting, the fears of counsel are realized and the course of action selected is enjoined or required to be undone, suit is brought by the merger partner or the lender claiming fraud, aiding and abetting fraud, negligence, securities laws violations and any other offenses then popular. Until recently, the rule of *Ultramares*[21] would have protected the lawyer in this situation from these third-party claims except for the securities laws exposure. The claims are not easily disposed of, and even when defense is successful, its costs are staggering. The client claims could have been forestalled by appropriate written precautions concerning the doubtful areas and would not have presented serious damage exposure in any event since the client was already "on the rocks," and his damage or loss flowed from that situation rather than from any act or failure of counsel. Today, in most jurisdictions the privity requirement of *Ultramares* has been eroded until it offers little or no protection. The tendency of courts and juries to look most favorably on the plaintiff's version of the facts makes even well-documented, precautionary warnings of counsel small comfort. Causation in the damage phase of a trial is all but presumed.

This process of risk transfer must be socialized. Few, if any, practitioners can respond to this type of liability exposure from their own assets, and the result is a three-stage progression to disaster. First, a remarkable increase in insurance premiums is observed. Second, there is a wholesale withdrawal by responsible underwriters from the market. Finally, social engineers come forward with mutual aid pools and arrangements on the theory that the ills of the profession are all due to the insurance industry. At no point is there infusion of the simple proposition that loss experience in legal malpractice or any other insurance area is a function of dollars in and dollars out. Accusing the insurance industry of misstating or concealing experience does not change this simple economic phenomenon.

Hopefully, attorneys are more articulate and they are certainly more political than other professionals. These qualities, however, have not been used effectively to control the expanding universe of lawyers' liability. Accountants, for example, have been far more vocal.[22] To the extent that attorneys have addressed the problem, they have done so only among themselves.

If Mr. Stern's purpose was to state the law, he has succeeded only as of the date of the reprinted articles included in the book. This "new" problem area is still so fluid that the only current publication would be an overnight printing, distributed the next day and printed on self-destructing paper with a ten-day life. If the book was intended to provoke thought, Mr. Stern should have commented on the articles, pointing out where the material fits in the progressive enlargement of malpractice liability, suggesting where we are heading and questioning the legal and social desirability of these trends. If attorneys' liability is a "problem," and the ABA seems to think so as do certain of the commentators reprinted in the book, this book could and should have seized the opportunity

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[21] Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

[22] See responses from the "Big Eight" accounting firms to the Metcalf and Moss reports, *Hearings Before the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. (1977).

to define the issues which require decision. Attorney errors of a mechanical nature have been, are now, and surely always will be with us. The issue which deserves attention today is the expanding universe of attorneys' liability in terms of those to whom the attorney owes a duty, the nature of his duty in terms of judgment decisions, and the quality of proof required of plaintiffs.

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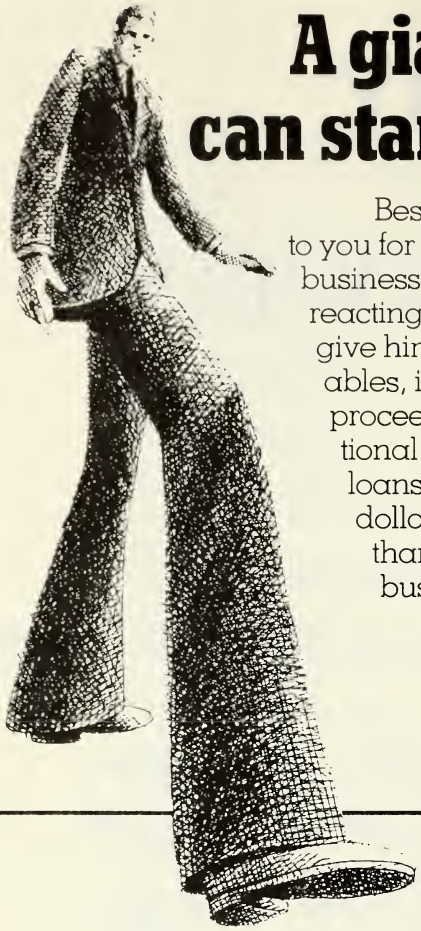

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